United States Court of Appeals for the Second Circuit



APPENDIX

75-7324

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID L. SALISBURY)
Plaintiff - Appellant) CIVIL APPEAL
V8) DOCKET NO. 75- 7324
The SOUTFERN NEW ENGLAND TELEPHONE)
COMPANY, INC., and WILLIAM J. O'KEEFE)
Defendants - Appelles	FILED
APPEN	DIX NOV3 1975 A DANIEL FUSARO, CLERK SECOND CIRCUIT

DAVID L. SALISBURY
PRO SE, Plaintiff - Appellant

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Waterbury, Connecticut 06720

PETER J. TYRRELL, ESQ.

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DAVID L. SALISBURY

vs.

THL SOUTHERN NEW ENGLAND TELEPHONE COMPANY and WILLIAM J. O'KEEFE

CIVIL NO. 15,770

:

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IN THE UNITED STATES DISTRICT COURT FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY

Plaintiff

The SOUTHERN NEW ENGLAND TELEPHONE COMPANY, a Public Utitliy Corporation, and WILLIAM J. O'KEEFE, an attorney, employed by and for said company, and certain other employees, or agents of said company, whose names are presently unknown;

Defendants

CIVIL DIVISION

15770 File Number

COMPLAINT

JURY DEMANDED

COUNT I

- 1. This action arises under the Constitution of the United States, and the laws of the United States, and in particular, under the provisions of the First and Fourteenth Amendments to the Constitution of the United States, and under Federal Law, partic darly the Civil Rights Act of 1871, Title 42, of the United States Code, Sections 1983, 1985, 1986 and 1988. The jurisdiction of this Court in invoked pursuant to the provisions of Title 28, Unites States Code, Sactions 1343, 2201, and 2202.
- 2. This action is authorized at law and equity to redress the deprivation under color or pretense of state law, statute, ordinance, regulation, custom, or usage, of rights, immunities and privileges secured to Plaintiff by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens. The rights here sought to be redressed are the rights to full freedom of speech guaranteed to Plaintiff by the First Amendment to the United States Constitution, and the rights guaranteed to Plaintiff by the due process and equal protection clauses, and the equal privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully appears.
- Plaintiff is an adult citizen residing at Hinman Road, Watertown, Connecticut with his family. Plaintiff receives his mail at P.O. Box 1771, Waterbury, Connecticut, 06720. During all times mentioned in this complaint, Plaintiff was a customer of, and a subscriber to the telephone services provided to himself and members of the general public by the Defendant, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, under color of law, statute, rules,

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regulations, ordinances, customs, or usages of the State of Connecticut.

Plaintiff is now, and at all times has been, ready, willing and able to pay any just, correct, and/or lawful charges due to the Defendant uniformly charged to other customers and subscribers, subject to reasonable proof of disputed charges.

- 4. The Defendant, THE SCUTHERN NEW ENGLAND TELEPHONE COMPANY, hereinafter called SNETCO, is a Public Utitlity Corporation, organized and existing under, and by virtue of the public laws and the special laws of the State of Connecticut, and having its main office and principal place of business at 300 George Street, New Haven, Connecticut, and further, having branch offices located throughout the State of Connecticut, and in particular, at 348 Grand Street, Waterbury, Connecticut. The Defendant, WILLIAM J. O'KEEFE, represents himself to be an attorney at law employed by and for the Defendant, SNETCO, and resides at 57 Vista Terrace, Cheshire, Connecticut, and maintains an office and business address at 227 Church Street, New Haven, Connecticut. The names and addresses of the other defendants, all of whom are agents, servants or employees of the Defendant, SNETCO, are presently unknown to the Plaintiff. As soon as the names and addresses and identities of the other defendants are discovered, Plaintiff will move this Court to amend his complaint to include their names, addresses and identities.
- 5. The Defendant, SNETCO, pursuant to the provisions of its charter, was incorporated, organized and created, inter alia, for the purpose to build, own, equip, buy, sell, operate, and maintain, systems of telephone exchange in any or all of said towns, cities, and villages of this State and of other States; and systems and methods of communication from and between any or all of said towns, cities, and villages of this State by means of telephones and telephonic apparatus; and generally to lease, rent, sell, and buy, telephones, and telephonic apparatus and rights of every and all descriptions; to sue and be sued, to plead and be impleaded, and to appear and prosecute to final judgment any suit or action at law or in equity in this state or elsewhere;...
- 6. The Defendant, SNETCO, operates its affairs and activities pursuant to an extensive and comprehensive statutory and regulatory scheme which regulates

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and controls every aspect of its activities and operations. The laws, statutes, ordinances, rules and regulations of the State of Connecticut, and in particular, the Public Utilities Commission of the State of Connecticut, regulating and controlling the activities and operations of Public Utilities within the State of Connecticut, including the Defendant, SNETCO, constitute a vital service provided by the State of Connecticut to the members of the public and to the Plaintiff.

- 7. The Defendant, SNETCO, performs a vital public function pursuant to the regulation and control by the State of Connecticut as aforesaid, and conducts its affairs, operations and activities in effect, as an agent of the State of Connecticut, and under color or pretense of law, and in so doing, is required to comply with the requirements of due process and equal protection of the laws as guaranteed by the Constitution of the United States, as well as each and every other right, privilege and immunity secured therein.
- 8. The conduct of its affairs, operations and activities by the Defendant, SNETCO, is carried out as aforesaid under color or pretense of law, in that the Defendant, SNETCO, has exclusive and monopolizing franchises to . furnish telephone service to the Plaintiff, and to other members of the public throughout most, if not all, of the State of Connecticut. Further, the Defendant, SNETCO, has special permission from the legislature of the State of Connecticut to use public highways for performing the necessary functions to provide said telephone service. Further, the Public Utilities Commission of the State of Connecticut is duly authorized and empowered to further regulate and control the affairs, operations and activities of the Defendant, SNETCO, including, but not limited to, one or more of the following ways:
 - a. Regulate the rates, schedules and operations of all Public Utilities.
- b. Require the filing and approval of rates, schedules, contracts, agreements, company rules and regulations, as a condition precedent to operation.
- c. Prescribe the rates, service and conditions of service for single persons.

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d. Prescribe, regulate and control any sale, acquisition, or merger by and/ or for any Public Utitlty, including the Defendant, SNETCO, of any or all of its assets or equipment.

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- e. Regulate and control the activities and affairs of Public Utilities, including the Defendant, SNETCO, with respect to customer deposits for service, and the return thereof, and the conditions under which the utility may terminate service to its customers.
- f. Hold hearings on request of Public Utilities requesting changes in rates, schedules or operations.
 - g. Require annual reports of the activities of Public Utilities.
- h. Permits the Defendant, SNETCO, and other Public Utilities to perform acts which they may not otherwise perform without violating State law.
- i. Apportion and assess fifty-six(56%) per cent of the expenses of the Commission among Public Utilities, including the Defendant, SNETCO, located in this State ... not exceeding six hundred thousand (\$600,000.00) dollars for any fiscal year.
- j. Provide penalties for failure to comply with the regulations of the Public Utilities Commission.
- k. Provide for judicial review of its decisions and orders affecting Public Utilities, including the Defendant, SNETCO, and decisions and orders affecting members of the public.
- 9. The Defendants, and each of them, acting under color of law, or pretense of law, have subjected Plaintiff, and other citizens, customers of the Defendant, SNETCO, to a pattern of conduct consisting of terminating telephone service, and of terminating said telephone service without notice and/or hearing, and without any provisions for an impartial hearing, and without notifying or informing Plaintiff, or other citizens, customers of said Defendant, of the reason(s), if any exist, for the termination of the telephone service as aforesaid, thereby denying and depriving Plaintiff, and other citizens, customers of the said Defendant, the rights, privileges, and immunities guaranteed to Plaintiff, and other citizens, customers of said Defendant, by the Constitution of the United States, and the laws of the United States, and further, this pattern of terminating telephone service as aforesaid, while carried out under color or pretense of law, have no excuse or justification in law, at are instead illegal and improper, and in no way

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necessary to the lawful and proper operations or activities of the Defendants.

- 10. Despite the fact that the Defendants, and each of them, knew, or should have known of the fact, that the aforementioned pattern of conduct was carried out by their agents, servants, or employees, the Defendants, and each of them, have taken no step or effort to order a halt to this course of conduct, or to make redress to Plaintiff, or to take any disciplinary action whatsoever against any of their agents, servants, or employees, and have in fact, encouraged their agents, servants, or employees in this course of conduct which denies, and deprives Plaintiff, and other citizens, customers of said Defendant, the rights, privileges, and immunities secured to them by the Constitution of the United States and the laws of the United States.
- 11. On or about February 1st, 1972, the Esfendants, and each of them, acting under color or pretense of the laws, statutes, ordinances, regulations, customs, and usages of the State of Connecticut, terminated the telephone service of this Plaintiff and his family at his residence at Hinman Road, Watertown, Connecticut. Further, said telephone service was terminated without notice or hearing of any kind, or without any provision for any hearing, and in particular without any provision for an impartial hearing, and said telephone service was not reinstated until on or about February 9, 1972 by the Defendants.
- 12. The Defendants, and each of them, by terminating Plaintiff's telephone service for hime days, abridged Plaintiff's right of freedom of speech as guaranteed by the First Amendment to the Constitution of the United States, and further, the refusal, neglect, or other failure of the Defendants, and each of them, to afford Plaintiff a hearing, and in particular, an impartial hearing prior to terminating his telephone service, denied and deprived Plaintiff of due process and equal protection under the law, and further, constituted a denial of equal rights, privileges, and immunities under the law, all of which are secured to Plaintiff by the Fourteenth Amendment to the Constitution of the United States and the laws of the United States.
- 13. On or about January 23rd, 1973, the Defendants, and each of them, acting under color or pretense of the laws, statutes, ordinances, regulations, customs, and usages of the State of Connecticut, again terminated the telephone

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services of this Plaintiff and his family at his residence at Hinman Road, in Watertown, Connecticut, and further, said telephone service was terminated without notice or hearing of any kind, or without any provision for any hearing, and in particular, without any provision for an impartial hearing.

14. On or about January 24th, 1973, and at divers times subsequent thereto, demand was made on the Defendants, and each of them, that the aforesaid telephone service be restored, and further, demand was made on the Defendants, on each of them, to advise, inform, and/or report to Plaintiff the reason(s), if any existed, for the termination of Plaintiff's telephone service.

15. The Defendants, and each of them, refused, and still refuse, to restore Plaintiff's telephone service, and further, Defendants, and each of them, have refused, and still refuse to advise, inform, or report to Plaintiff the reason(s), if any exist, for the termination of Plaintiff's telephone service, or to furnish Plaintiff with any particulars in connection with said termination, and have refused, and still refuse, to deal with Plaintiff regarding the termination of Plaintiff's telephone service or other acts as hereinbefore mentioned.

telephone service as aforesaid, and further, by terminating Plaintiff's telephone service without notice, and/or without prior hearing, and in particular, a fair and impartial hearing, abridged and abrogated Plaintiff's right and privilege of freedom of speech as guaranteed to Plaintiff by the First Amendment to the Constitution of the United States, and further, said conduct and actions by the Defendants, and each of them, to afford Plaintiff a hearing, and in particular, a fair and impartial hearing prior to terminating his telephone service, and further, the refusal, neglect, or other failure of the Defendants, and each of them, to restore said telephone service, and/or to advise, inform, or report to Plaintiff the reason(s), if any exist, or existed, for said termination, or the refusal by the Defendants, and each of them, to deal with Plaintiff regarding the conduct and actions as aforesaid, have denied and deprived Plaintiff of due process and equal protection under the law,

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and further, have denied and deprived Plaintiff of the equal rights, privileges, and immunities secured to Plaintiff by the provisions of the Fourteenth Amendment to the Constitution of the United States, and the laws of the United States.

17. During all times mentioned herein, the Defendants, and each of them, separately, and in concert, engaged in the illegal conduct here mentioned to the injury of the Plaintiff, and denied and deprived Plaintiff of the rights, privileges and immunities secured to Plaintiff by the Constitution of the United States and the laws of the United States as aforesaid.

18. Further, the Defendants, and each of them, separately, and in concert, acted outside of the scope and intendment of the laws of the State of Connecticut, and the laws of the United States, and further, the Defendants, and each of them, separately, and in concert, acted wilfully, knowingly, and purposefully, and further, acted with the specific intent to deny and deprive Plaintiff of the rights, privileges, and immunities secured to Plaintiff by the Constitution of the United States, and the laws of the United States as aforesaid, all to his damage and injury.

19. As a direct and proximate result of the acts of the Defendants, and each of them, as aforesail, Plaintiff has actually and constructively been hindered and obstructed, and denied and deprived, of his right and privilege to telephone and communicate with his friends, business associates, attorneys, employers, police, firemen, doctors, hospitals, garages, members of the public, and others with whom Plaintiff must communicate, and has been denied and deprived from receiving telephone calls from his employers, attorneys, and family, all of which has caused Plaintiff much anxiety and distress, and has put Plaintiff to great inconvience, hardship and daily expense, and will continue to do so until said telephone service is restored. As a further direct and proximate result of the acts of the Defendants, and each of them, Plaintiff has been, and will continue to be required to spend a great deal of time daily away from home and family in order to pursue his daily activities, thereby denying him the quiet enjoyment of his property to which he is

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rightfully and lawfully entitled, and further, Plaintiff has been, and will continue to be required to spend much time and more daily until said telephone service is restored, in traveling great distance to public telephones, or to visit those friends, business associates, and attorneys with whom Plaintiff desires, or is required to communicate with in the daily pursuit of Plaintiff's business and/or social activities to which he is lawfully entitled. Further, Plaintiff has been, and will continue to be unable to summon emergency assistance, including police, firemen, doctors, or ambulances, garage service, or other emergency equipment for the protection of himself and his family and his property, and thereby he is now, and will continue to be greatly endangered in his, and his family's health, safety and welfare, and his property greatly jeopardized, and further, Plaintiff, and his family has been, and will continue to be unable to maintain communication with their respective employers, and therefore, Plaintiff and his family are in great and imminent danger of the loss of their occupations. Further, Plaintiff has been, and will continue to be greatly hindered and obstructed and delayed in communicating with his attorneys for necessary consultation regarding litigation pending in the State Courts. And further, Plaintiff has been, and will continue to be required to spend much time and money daily to try and have his telephone service restored and in preparation and prosecution of this action and in attempting to redress the rights, privileges and immunities secured to Plaintiff by the Constitution of the United States, and the laws of the United States, all of which have been wrongfully abrogated by the Defendants.

WHEREFORE, Plaintiff respectfully prays that the Defendants and each of them, be cited to appear and answer herein as the law requires, and on final hearing hereof, have judgment against the Defendants, and each of them, jointly and severally, as follows:

- a. For the sum of \$15.00 per day for each and every day Plaintiff has been and will be without telephone service, as compensatory damages.
- b. For the sum of \$10,000.00 for such other general damages has Plaintiff has suffered and will continue to suffer as shall herein be found.

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- c. For the sumof \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as punitive damages.
- d. For legal interest from the date of each loss as shall herein be ascertained.
- e. For such sums as this court may deem reasonable for attorney's fees for service in this action.
 - f. For all costs of suit and disbursements herein.
- g. For such other, further, and additional relief as to this court may seem proper in the premises.

COUNT II

- 1. Paragraphs one through ten of the First Count are hereby incorporated and made paragraphs one through ten of this count as though more fully set forth herein.
- 11. On or about September 29th, 1970, Plaintiff commenced a civil action against the Defendant, SNETCO, returnable the Third Tuesday of November, 1970, to the Fourth Circuit Court for the State of Connecticut, located at 235 Grand Street, Waterbury, Connecticut, seeking to recover certain sums of money Plaintiff alleges are due him from the Defendant, SNETCO, which the Defendant refused, and still refuses to pay.
- 12. Paragraphs eleven through sixteen of the First Count are hereby incorporated and made paragraphs twelve through seventeen respectively of this count as though more fully set forth herein.
- 18. The termination of Plaintiff's telephone service and other related acts on the respective days as aforesaid, by the Defendants, and each of them, acting separately and in concert, has actually and constructively hindered, obstructed, delayed, and otherwise interfered with and prevented Plaintiff from consulting and communicating with his attorneys in the prosecution of said lawsuit, and will continue to hinder, obstruct, delay and prevent Plaintiff from consulting and communicating with his attorneys in said matter in the future, all of which Defendants, and each of them well knew, or should

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have known, and said acts were done by the Defendants, and each of them, acting separately and in concert, to hinder obstruct, delay and otherwise prevent Plaintiff from prosecuting said lawsuit and to prevent Plaintiff from prevailing in said lawsuit, all of which is, and was illegal, unlawful and in contravention of the laws of the State of Connecticut and the laws of the United States, and denies and deprives Plaintiff of the rights, privileges, and immunities secured to Plaintiff by the provisions of the Fourteenth Amendment to the Constitution of the United States, all to his demage and injury.

- 19. Further, the Defendants, and each of them, acting separately and in concert, as aforesaid, acted knowingly, wilfully, purposefully, and with the specific intent to hinder, obstruct, delay and prevent Plaintiff from the lawful prosecution of said lawsuit and to prevent him from prevailing in said suit, all of which is illegal, unlawful, and denies and deprives Plaintiff of the rights, privileges and immunities secured to Plaintiff by the Constitution of the United States and the laws of the United States, all to his damage and injury.
- 20. Paragraph 19 of the First Count is hereby incorporated and made"
 paragraph twenty of this count as though more fully set forth herein.

WHEREFORE, Plaintiff respectfully prays that the Defendants, and each of them, be cited to appear and answer herein as the law requires, and on final hearing hereof, have judgment against the Defendants, and each of them, jointly and severally, as follows:

- a. For the rum of \$15.00 per day for each and every day Plaintiff has been and will be without telephone service, as compensatory damages.
- b. For the sum of \$10,000.00 for such other general damages has Plaintiff has suffered and will continue to suffer as shall herein be found.
- c. For the sum of \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as exemplary and punitive damages.
- d. For legal interest from the date of each loss, as shall herein be ascertained.

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- e. For such sums as this court may deem reasonable for attorney's fees for service in this action.
 - f. For all costs of suit and disbursements herein.
- g. For such other, further, and additional relief as to this court may seem proper in the premises.

COUNT III

- 1. Paragraphs one through eighteen of the Second Count are hereby incorporated and made paragraphs one through eighteen of this count as though more fully set forth herein.
- 19. The Defendants, and each of them, acting separately and in concert, have hindered, obstructed, and delayed Plaintiff further in the prosecution of said lawsuit with the intent to prevent Plaintiff from prevailing in said lawsuit, by divers additional illegal and improper acts, to wit; filing, or causing to be filed in said lawsuit, improper and sham and dilatory pleadings, all of which is unlawful and done for the purpose of impeding or defeating the due course of justice in said lawsuit, and to deny and deprive Plaintiff the equal protection of the laws, and to deny and deprive Plaintiff of the rights secured to Plaintiff by the Constitution and laws of the United States.
- 20. Paragraph nineteen of the Second Count is hereby incorporated and made paragraph twenty of this count as though more fully set forth herein.
- 21. On or before February 1st, 1972, and again, on or before January 23rd, 1973, the Defendants, and each of them, in violation of Title 42 United States Code, Section 1985 (2) and (3), did conspire and agree between themselves and with other persons, whose names are presently unknown to Plaintiff, to do the acts complained of hereinbefore, for the purpose of impeding, hindering, obstructing, or defeating the due course of justice in the State of Connecticut, and with the intent to deny and deprive Plaintiff the equal protection of the laws, and to injure Plaintiff for lawfully attempting to obtain his right under the Constitution and laws of the United States as beginned for set forth.
 - 22. In furtherance of the object of said conspiracy ne or more of said

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Defendants and conspirators did do or cause to be done the acts and things as complained of in herein above and, in violation of Title 42 United States Code, Section 1985 (2) and (3), did thereby injure Plaintiff as hereinafter set forth, and denied and deprived Plaintiff of having and exercising his rights and privileges under the laws and Constitution of the United States as more particularly set forth in paragraph sixteen of the First Count herein.

- 23. Paragraph nineteen of the First Count is hereby incorporated and made paragraph twenty-three of this count as though more fully set forth herein.
- 24. As a further direct and proximate result of the acts of the Defendants, and each of them, as complained of herein above, Plaintiff has been put to considerable loss of time and money in the prosecution of the lawsuit mentioned in paragraph eleven of the Second Count, and will in the future be required to spend much extra time and money in the prosecution of said lawsuit, and is in imminent danger of the loss of the monies rightfully due him from the Defendant, SNETCO in that the actions of the Defendants, and each of them as aforesaid may well cause him the loss of his action.

WHEREFORE, Plaintiff respectfully prays that the Defendants, and each of them, be cited to appear and answer herein as the law requires, and on final hearing hereof, have judgment against the Defendants, and each of them, jointly and severally, as follows:

- a. For the sum of \$15.00 per day for each and every day Plaintiff has been and will be without telephone service as compensatory damages.
- b. For the sum of (10,000.00 for such other general damages has Plaintiff has suffered and will continue to suffer as shall herein be found.
- c. For the sum of \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as exemplary and punitive damages.
- d. For legal interest from the date of each loss, as shall herein be ascertained.
- e. For such sums as this court may deem reasonable for attorney's fees for service in this action.

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- f. For all costs of suit and disbursements herein.
- g. For such other, further, and additional relief as to this court may seem proper in the premises.

COUNT IV

- Paragraphs one through twenty-two of the Third Count are hereby incorporated and made paragraphs one through twenty-two of this count as though more fully set forth herein.
- 23. At all times mentioned herein, the Defendants, and onspirators, or one or more of them, had knowledge of the wrongs and conspiracies that were about to be committed, and in fact were committed as hereinabove set forth, and further, the Defendants, and conspirators, or one or more of them, were empowered and duly authorized to prevent, or to aid in preventing the commission of said wrongs and conspiracies which denied Plaintiff of the equal protection of the laws guaranteed by the provisions of the Fourteenth Amendment to the Constitution of the United States, and the laws of the United States, the Defendants, or one or more of them, acting separately, or in concert, or omitting to act, wrongfully neglected to prevent, or to aid in the prevention of the commission of the wrongs herein mentioned against Plaintiff, and further, notwithstanding that under the law, the Defendants, or one or more of them were empowered and duly authorized to secure to Plaintiff the equal rights, privileges and immunities that are secured to Plaintiff which the Defendants, or one or more of them could have secured to Plaintiff by the excercise of reasonable diligence, the Defendants, and conspirators, or one or more of them, acting separately, or in concert, or omitting to act, and further by wilfully and intentionally acting, or omitting to act to prevent, or to aid in preventing, or to use reasonable diligence to prevent the commission of the wrongs and conspiracies herein above mentioned, all of which is in contravention of Title 42, United States Code, Section 1986, denied and deprived Plaintiff of the equal protection of the laws and the equal rights, privileges and immunities secured to Plaintiff by the Fourteenth Amendment of

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the Constitut on, of the United States and the laws of the United States.

24. Paragraphs twenty-three and twenty-four the Third Count are hereby incorporated and made paragraphs twenty-four and twenty-five of this count as though more fully set forth herein.

WHEREFORE, Plaintiff respectfully prays that the Defendants, and each of them, be cited to appear and answer herein as the law requires, and on final hearing hereof, have judgment against the Defendants, and each of them, jointly and severally, as follows:

For the sum of \$15.00 per day for each and every day Plaintiff has been and will be without telephone service as compensatory datages.

- b. For the sum of 10,000.00 for such other general damages has Plaintiff has suffered and will continue to suffer as shall herein be found.
- c. For the sum of \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as exemplary and punitive damages.
- d. For legal interest from the date of each loss, as shall herein be ascertained.
- e. For such sums as this court may deem reasonable for attorney's fees for service in this action.
 - f. For all costs of suit and disbursements herein.
- g. For such other, further, and additional relief as to this court may seem proper in the premises.

COUNT V

- 1. Paragraphs one and two of the First Count are hereby incorporated and made paragraphs one and two of this count as though more fully set forth herein.
- 3. Further, this is a proceeding for a preliminary and a permanent injunction, enjoing and restraining Defendants, and each of them, their agents, servants, employees and successors from continuing or maintaining any policy, practice, action, custom or usage of withholding, interfering, denying or

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depriving, or attempting to withhold, deny, or deprive Plaintiff of any telephone service, or to otherwise interfere in any manner whatsoever with any telephone service to Plaintiff, and further, to enjoin, restrain Defendants, and each of them, their agents, servants, employees, and successors, from doing, or continuing, or maintaining any policy, practice, action, custom or usage of otherwise interfereing with, or denying or depriving Plaintiff of any rights, privileges, or immunities secured to Plaintiff by the Constitution of the United States and the laws of the United States in any way or manner.

- 4. Further, this is a proceeding for a declaratory judgment, brought pursuant to the provisions of Title 28, United States Code, Sections 2201, and 2202, to determine, adjudge, and declare the rights and relations, and/or the legal rights and relations of the parties, as is hereinafter more fully set forth.
- 5. Paragraphs three through ten of the First Count are hereby incorporated and made paragraphs five through twelve of this count as though more fully set forth herein.
- 13. Paragraphs eleven through eighteen of the Second Count are hereby incorporated and made paragraphs thirteen through twenty respectively of this count as though more fully set forth herein.
- 21. Paragraphs rineteen through twenty-two of the Third Count are hereby incorporated and made paragraphs twenty-one through twenty-four respectively of this count as though more fully set forth herein.
- 25. Paragraphs twenty-three, twenty-four, and twenty-five of the Fourth Count are hereby incroporated and made paragraphs twenty-five, twenty-six, and twenty-seven respectively of this count as though more fully set forth herein.
- 28. The conduct and actions by the Defendants, and each of them, as hereinbefore mentioned, against Plaintiff, has resulted in Plaintiff suffering immediate and irreparable injury, and unless enjoined and restrained, the damage and injury done to Plaintiff by reason of his being deprived and denied the rights, privileges and immunities as aforesaid, will be continuing and

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David L. Salisbury vs The Southern New England Telephone Company - Complaint Page 16. irreparable, and Plaintiff has no plain, complete, and adequate remedy at law. WHEREFORE, Plaintiff respectfully prays that the Defendants, and each of them, be cited to appear and answer herein as the law requires, and that this Court advance this case on the docket and order a speedy hearing of same and upon said hearing this Court: A. Have judgment against the Defendants, and each of them, jointly and severally as follows: a. For the sum of \$15.00 per day for each and every day Plaintiff has been, and will be without telephone service as compensatory damages. b. For the sum of \$10,000.00 for such other general damages Plaintiff has suffered and will continue to suffer as shall herein be found. c. For the sum of \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as exemplary and punitive damages. d. For legal interest from the date of each loss, as shall herein be ascertained. e. For such sums as this Court may deem reasonable for attorney's fees for service in this action. f. For all costs of suit and disbursements herein. g. For such other, further, and additional relief as to this Court may seem proper in the premises. B. That this Court hold, adjudge, decree and declare the rights and other legal relations of the parties to the subject matter here in controvers in order that such declaration shall have the force and effect of a final just at, as fo. lows: a. Whether the policy, practice, action, rule, custom, or usage, by whatever name called, of terminating telephone service to Plaintiff without adequate notice, and a fair and impartial hearing prior to said termination, constitutes a denial and deprivation of the rights, privileges, and immunities secured to Plaintiff under the Constitution and laws of the United States. b. Whether the policy, practice, action, rule, custom, or usage, by

David L. Salisbury vs The Southern New England Telephone Company- Complaint Page 17. whatever name called, of refusing to restore telephone service to Plaintiff, or to advise, inform or report to him the reasons therefore, if any exist, is unconstitutional in that said conduct constitutes a denial of the rights, privileges, and immunities secured to Plaintiff by the Constitution and laws of the United States. c. Whether the policy, practice, action, rule, custom, usage, by whatever name called, of hindering, obstructing, delaying, or otherwise interfering with Plaintiff in any legal action or proceeding in any manner, except as provided by law, is unconstitutional in that said conduct constitutes a denial of the equal protection of the laws, and is a denial of the rights, privileges, and immunities secured to Plaintiff by the Constitution and laws of the United States. d. Whether the Defendants, and each of ther and their agents, servants, or employees, or successors may continue and maintain any of the

- d. Whether the Defendants, and each of ther and their agents, servants, or employees, or successors may continue and maintain any of the above mentioned policies, practices, actions, rules, customs, usages, by whatever name called, that denies and deprives Plaintiff of the rights, privileges, and immunities secured to Plaintiff by the Constitution and laws of the United States, or otherwise in any manner deny, deprive of interfere with any rights, privileges, or immunities secured to Plaintiff as aforesaid.
- e. What the requirements of adequate notice should be, and what procedure would constitute a fair and impartial hearing prior to any termination, and upon whom would the burden of proof lie, and what provision should be made for any judicial review of any results of any hearing as aforesaid.
- C. That this Court issue and decree a premliminary injunction as the law provides, and upon final hearing make said injunctions permanent, enjoing and restraining Defendants, and each of them, their agents, servants, or employees, or successors, acting separately, or in concert, from doing, or continuing or maintaining any policy, practice, action, custom, or usage, as set forth below:
- a. Terminating Plaintiff's telephone service or otherwise interfering with Plaintiff's telephone service without adequate notice and a fair and

- 3 -

David L. Salisbury vs The Southern New England Telephone Company - Complaint

Page 18.

impartial hearing prior to any termination or interference.

- b. Failing to advise, inform, or report to Plaintiff, and in writing, of any and all reasons, if any exist, for any termination or any interference with any telephone service prior to any hearing or request to terminate any telephone service to Plaintiff.
- c. Failing to advise, inform, or report to Plaintiff, and in writing, of any and all reasons, if any exist, for the termination of Plaintiff's telephone service on January 23rd, 1973, as aforesaid, and the reasons, if any exist for the continued conduct in refusing to restore said telephone service.
- d. Failing to follow any and all provisions of the Constitution and laws, statutes, rules, regulations, and ordinances of the State of Connecticut and the United States, in any relations concerning Plaintiff and the Defendants.
 - e. Refusing to restore or to furnish Plaintiff with telephone service.
- f. Hindering, obstructing, impeding, delaying, or otherwise interfering with Plaintiff in the defense or prosecution of any proceeding or legal action by any means, or in any manner, except as clearly authorized and provided for by law, statute, rule or regulation.
- g. Denying, depriving, or otherwise interfering with any rights, privileges, or immunities secured to Plaintiff by the Constitution and laws of the United States, and the State of Connecticut.
- h. Conspiring, agreeing, or planning between themselves, or others, to deny, deprive, or otherwise interfere with any rights, privileges, or immunities secured to Plaintiff by the Constitution and laws of the United States, and the State of Connecticut.
- i. Failing to prevent, or aid in preventing, or to use reasonable diligence in preventing any conspiracy, plan or agreement, as aforesaid.
- D. That this Court grant such other, further, additional, or alternative relief at law, or in equity, as to this Court may seem proper in the premises.

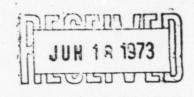
Respectfully submitted,

THE PLAINTIFF, Pro Se

David L. Salisbury

P.O. Box 1771

Waterbury, Connecticut 06720



UNITED STATES DISTRICT COURT

FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY)	
Plaintiff)	CIVIL ACTION NO. 15770
VS.		
SOUTHERN NEW ENGLAND TELEPHONE		
COMPANY, INC., et al)	MOTION TO DISMISS COMPLAINT
Defendants)	

The defendants jointly move the Court to dismiss the action because the Complaint fails to state a claim against the defendants upon which relief can be granted, in that it appears on the face of the Complaint that:

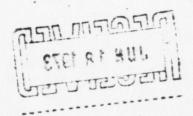
- 1) said complaint is unverified;
- 2) no discrimination is alleged, nor can it be;
- 3) the defendants were not acting under color of state law as a matter of law; and
- 4) no facts are alleged, nor can they be, to support a claim of a conspiracy or discrimination.

THE DEFENDANTS

SOUTHERN NEW ENGLAND TELEPHONE COMPANY WILLIAM J. O'KEEFE

BY

PETER J. TYRRELL GRIFFIN & BRAYTON 48 Leavenworth Street Waterbury, Connecticut 06702



ATTORNEYS AT LAW WATERBURY, CORN.

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CERTIFICATION OF SERVICE

I hereby certify that on the 15th day of June, 1973, a copy of the forgoing Motion to Dismiss Complaint was mailed, via U.S. Mail, postage prepaid, to David Salisbury, P. O. Box 1771, Waterbury, Connecticut.

PETER J. TYRRELL 48 Leavenworth Street Waterbury, Connecticut

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RIFFIN and BRAYTON ATTORNEYS AT LAW WATERBURY, CONN.

UNITED STATES DISTRICT COURT FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBU	SALISBURY			
	Plaintiff)	CIVIL ACTION NO.	15770
vs.				
SOUTHERN NEW ENG	GLAND TELEPHONE		,	
COMPANY, INC.,	et al)	ORDER	
	Defendants)		

- 1. said complaint is unverified;
- 2. no discrimination is alleged, nor can it be;
- the defendants were not acting under color of state law as a matter of law; and
- 4. no facts are alleged, nor can they be, to support a claim of a conspiracy or discrimination, and the Court having heard the argument of counsel and being fully advised, it is ORDERED that the defendants' motion to dismiss the action because the Complaint fails to state a claim against the defendant upon which relief can be granted, and that the Complaint be and it is hereby dismissed (with leave to the plaintiff to file an Amended Complaint within _____ days) (without leave to amend and that the action be dismissed with prejudice).



UNITED STATES DISTRICT COURT JUDGE

ATTORNEYS AT LAW WATERBURY, CONN.

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UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

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U. S. DISTRICT COURT

NEW HAVEN, CONN.

DAVID L. SALISBURY

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CIVIL NO. 15,770

THE SOUTHERN NEW ENGLAND TELEPHONE CO. and WILLIAM J. O'KEEFE

*

RULING ON DEFENDANTS' MOTION TO DISMISS

The plaintiff instituted this action pursuant to the provisions of the Civil Rights Act for declaratory relief and damages, alleging that he was denied the protections of procedural due process when the defendant public utility company discontinued his telephone service without notice or cause. The only issue posed by the defendants' motion to dismiss is whether termination of the service constitutes "state action."

Reciting various civil rights claims under 42 U.S.C. \$5 1983, 1985, and 1986, the plaintiff's five-count complaint, filed <u>pro se</u>, is a rather lengthy, verbose document. In essence, however, it asserts that the defendant telephone company and its employees disconnected the plaintiff's service without cause, notice or hearing under color of

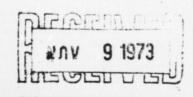
Since the defendants do not raise the issue whether the deprivation of telephone service is a cognizable right within the due process clause, the Court assumes they concede the point. See <u>Fuentes v. Shevin</u>, 407 U.S. 67 (1972); <u>Lynch v. Household Finance Corp.</u>, 405 U.S. 538 (1972); <u>Goldberg v. Kelly</u>, 397 U.S. 254 (1970).

Evenues of the Dublie Hillities Commission as defined in 816_10 of the Connecticut

state law, resulting in great inconvenience, embarrassment and expense to the plaintiff and his family. Among other allegations, the plaintiff in his complaint and moving papers, recognizing the need to demonstrate a sufficient nexus between the State of Connecticut and the company, sets forth many factual and statutory references to sustain his position that the public utility is "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966).

The defendant company, on the other hand, contends that it is a privately owned, financed and operated company, that the Public Utilities Commission of the State of Connecticut "does not interfere, control or govern [the company's] daily business operation or operations of the corporation with the consumer", that the action of the company in terminating the plaintiff's service was taken pursuant to its own rules without utilizing any state statute or regulation and without any specific direction or authorization of a state regulatory body, that the "color of state law" test has not been satisfied and, therefore, the case should be dismissed.

Research of litigation under § 1983 between a public utility company and its customer based on the termination of service reveals differing results. This is inevitable



because no Supreme Court case sets out a precise definition of state action. As stated by Justice Rehnquist in Moose Lodge 107 v. Irvis, 407 U.S. 163, at 172 (1972):

While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "State action" on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."

See also Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

viable cause of action under the due process clause for the discontinuance of a utility service. See, e.g., Palmer v.

Columbia Gas Company of Ohio, Inc., 479 F.2d 153 (6 Cir.

1973) (nonpayment of bills); Ihrke v. Northern States Power

Company, 459 F.2d 566 (8 Cir.), vacated as moot, 409 U.S.

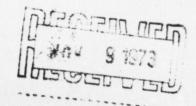
815 (1972) (nonpayment of bills); Bronson v. Consolidated

Edison Co., 350 F.Supp. 443 (S.D.N.Y. 1972) (nonpayment of bills); Hattell v. Public Service Company, 350 F.Supp. 240

(D. Colo. 1972) (nonpayment of bills); Stanford v. Gas Service

Company, 346 F.Supp. 717 (D.Kan. 1972) (nonpayment of bills).

On the other hand, other courts as we held that the protections of the Fourteenth Amendmen; do not apply to terminations of utility services or to other practices of public utility companies. See, e.g., <u>Jackson v. Metropolitan Edison Company</u>, <u>F. 2d</u> (3 Cir. August 21,



1973) (nonpayment of bills); Lucas v. Wisconsin Electric

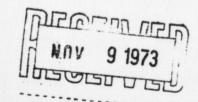
Power Company, 466 F.2d 638 (7 Cir. 1972) (en banc), cert.

denied, 409 U.S. 1114 (1973) (nonpayment of bills); Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189

(7 Cir.), cert. denied, 409 U.S. 890 (1972) (requirement of security deposits); Kadlec v. Illinois Bell Tel. Co., 407 F.

2d 624 (7 Cir.), cert. denied, 396 U.S. 846 (1969) (misuse of telephone service).

Reliance upon precedents, however, cannot be dispositive because, as stated in Palmer v. Columbia Gas of Ohio, Inc., supra, 479 F.2d at 162, "the significance of the involvement of the state in the actions of any kind of private conduct can only be determined by an examination of the facts of each particular case. . . " See also the catalogue of factors deemed relevant by Judge Kerner in Kadlec v. Illinois Bell Tel. Co., supra, 407 F.2d at 628 (concurring opinion). Thus, the Court must sift the facts and circumstances of each case in order to decide whether the extent of the state's involvement or control in the operations and management of the public utility is such that the private firm becomes subject to the constitutional limitations placed upon state action . Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). See generally Note, Fourteenth Amendment Due Process In Terminations Of Utility Services For Nonpayment, 86 Harv. L. Rev. 1477, 1485-1494 (1973).



plaint as true, as is required, California Motor Transport

Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972), and

based upon the Court's own research, it seems clear that the

defendant telephone company is comprehensively regulated and

controlled in almost every aspect of its activities by the

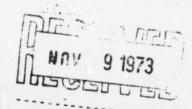
Public Utilities Commission of the State of Commission of the State of Commission. A

perusal of Title 16 of the Connecticut General Statutes, and

the regulations promulgated thereunder by the Public Utili
ties Commission, discloses a pervasive statutory and regu
latory scheme which affects the daily business life of all

public utilities in this State.

The P.U.C. has general supervision over all utility companies in Connecticut, and, among other things, has the power to examine safety conditions, Conn. Gen. Stat. § 16-11, investigate accidents, § 16-14, restrict use of streets, poles and wires, § 16-18, rule on rates, § 16-19, require annual reports, § 16-27, provide penalties for failure to comply with its regulations, § 16-41, and regulate mergers, sales, leases, borrowing, lending, and all "managerial service contracts", § 16-43. Two additional statutes are significant in the light of the facts of this case. Section 16-20 permits any person aggrieved by the failure of a public utility to furnish service to appeal for relief to the P.U.C., and its decision is binding upon the company. However, resort to the statutory remedy is not mandatory, and



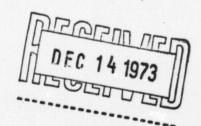
UNITED STATES DISTRICT COURT

FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY)	
Plainti	ff)	CIVIL ACTION NO. 15770
Vs.		
SOUTHERN NEW ENGLAND TELEP	HONE	
COMPANY, INC., et al)	COUNTERCLAIM
Defenda	ints)	

- 1. The defendant, Southern New England Telephone Company, has a claim against the plaintiff, David L. Salisbury, arising out of the transaction or occurrence that is the subject matter of said plaintiff's claims, as set forth in his Complaint, and the adjudication of which does not require the presence of third parties over whom the Court herein cannot acquire jurisdiction.
- 2. The defendant is a corporation organized and existing under the laws of the State of Connecticut, having its office and principal place of business in the City of New Haven and having branch offices in other cities and towns of the State of Connecticut, and is engaged in the business of supplying telephone service to its subscribers.
- The plaintiff was a subscriber of the defendant's telephone service and resided at Hinman Road, Watertown, Connecticut.
- 4. On or about July 21, 1972, and for some time prior thereto, the plaintiff was a subscriber of the defendant, and on said day the defendant mailed a monthly bill to the plaintiff, which monthly bill was paid in full.

CRIFFI and BRAYTON ATTOLNEYS AT LAW WATERBURY, CONN.



- 5. On the 21st day of the months of August, September, October, November, December, all of 1972, and January 21, 1973, the defendant mailed a monthly bill to the plaintiff for telephone services rendered according to its tariff regulations.
 - 6. Said bills were either partially paid or remained unpaid.
- 7. On or about January 23, 1973, there remained and due an outstanding bill in the amount of \$49.71 from the plaintiff.
- 8. The defendant at all times herein remained ready, willing and able to perform and deliver telephonic service to the plaintiff and in fact, did deliver said telephonic service to the plaintiff for the aforementioned dates; to wit: from August 21, 1972, to January 23, 1973, when the plaintiff's service was terminated.
- 9. After crediting the plaintiff with the unused portion of the month, within which his telephone service was terminated, there was a credit given the plaintiff of \$6.80, reducing his obligation to \$42.81.
- 10. Due demand was made upon the plaintiff for said sum, yet the same is due and owing to date.

THE DEFENDANT CLAIMS:

FIFTY AND 00/100ths DOLLARS (\$50.00) Damages.

THE DEFENDANTS

BY

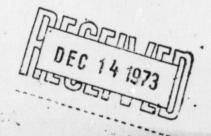
PETER J. TYRRELL 48 Leavenworth St. Waterbury, Connecticut 06702

CERTIFICATION

I hereby certify that on the 13th day of December, 1973, a copy of the foregoing Counterclaim was mailed, via U.S. Mail, postage prepaid, to David Salisbury, P. O. Box 1771, Waterbury, Connecticut.

PETER J. TYRRELL

GRIFFIN and BRAYTON ATTORNEYS AT LAW WATERSURY, CORN.



UNITED STATES DISTRICT COURT

FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY)		
Plaintiff)	CIVIL ACTION NO.	15770
vs.			
SOUTHERN NEW ENGLAND TELEPHON	1Ē		
COMPANY, INC., et al)	ANSWER	
Defendants)		

FIRST COUNT:

- 1. The defendants admit Paragraph No. 4, No. 5 and No. 6.
- 2. The defendants deny Paragraph No. 1, No. 7, No. 8, No. 9, No. 10 No. 11, No. 12, No. 13, No. 15, No. 16, No. 17, and No. 18.
- 3. As to the allegations contained in Paragraph No. 2, No. 3, No. 14, No. 19, the defendants have insufficient knowledge upon which to form a pleading and therefore leave the plaintiff to his proof.

SECOND COUNT:

- The answers of Paragraphs No. 1 through 10 of the First Count are hereby correspondingly made Answers to Paragraph 1 through 10 of this Second Count, as if more fully set forth herein.
 - 11. Paragraph No 11 is admitted.
- 12. The answers to Paragraph No. 11 through 16 of the First

 Count are hereby correspondingly made Answers to Paragraphs No. 12 through

 No. 17 of this Count as if more fully set forth herein.
- 18. The defendants have no knowledge upon which to form a pleading and therefore leaves the plaintiff to his proof.
 - 19. The defendants deny Paragraph No. 19.
- 20. The defendants have insufficient knowledge upon which to form a pleading and therefore leave the plaintiff to his proof.

ATTORNEYS AT LAW WATERSURY, CONN.

- 1. The answers to Paragraphs No. 1 through No. 18 of the Second Count are hereby correspondingly made Paragraphs No. 1 through No. 18 of this Count, as if more fully set forth herein.
 - 19. The defendants deny Paragraphs No. 19, No. 20, No. 21, and No. 22.
- 23. As to Paragraphs No. 23 and No. 24, the defendants did have insufficient knowledge upon which to form a pleading and therefore leave the plaintiff to his proof.

FOURTH COUNT:

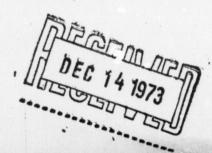
THIRD COUNT:

- 1. The answers to Paragraphs No. 1 through No. 22 of the Third Count are hereby correspondingly made the answers to Paragraphs No. 1 through No. 22 of this Count, as if more fully set forth herein.
 - 23. The defendants deny Paragraph No. 23.
- 24. As to the allegations contained in Paragraph No. 24 and No. 25, the defendants have insufficient knowledge upon which to form a pleading, and therefore leave the plaintiff to his proof.

FIFTH COUNT:

- 1. The answers to Paragraph No. 1 and No. 2 of the First Count are correspondingly made herby Answers to Paragraphs No. 1 and No. 2 of this Count, as if more fully set forth herein.
- 3. As to the allegations contained in Paragraphs No. 3, No. 4, No. 28, the defendants have insufficient knowledge upon which to form a pleading and therefore leave the plaintiff to his proof.
- 5. The Answers to Paragraphs No. 3 to No. 10 of the First Count are hereby correspondingly made Answers to Paragraphs No. 5 through No. 12 of this Count, as if more fully set forth herein.
- 13. The answers to Paragraphs No. 11 to No. 18 of the Second Count are hereby correspondingly made Answers to Paragraphs 13 to No. 20 of this Count as if more fully set forth herein.

GRIFFIN and BRAYTON ATTORNEYS AT LAW WATERBURY, CONN.



- 21. The answers to Paragraphs No. 19 through No. 22 of the Third Count are hereby correspondingly made the Answers to Paragraph No. 21 through No. 24 of this Count, as if more fully set forth herein.
- 25. The answers to Paragraphs No. 23 to No. 25 of the Fourth Count are correspondingly made the Answers to Paragraphs No. 25 through No. 27 of this Count, as if more fully set forth herein.

FIRST AFFIRMATIVE DEFENSE

Pursuant to 28 U.S.C., Sec. 1342, this Court does not have jurisdiction to restrain the defendants from complying with the Connecticut Public Utilities

Commission Tariff Regulations, or a case arising thereunder.

SECOND AFFIRMATIVE DEFENSE

This Court does not have jurisdiction to entertain the plaintiff's civil rights cause of action, as the plaintiff has not exhausted his state administrative remedies.

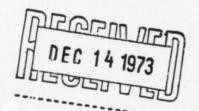
THE DEFENDANTS

PETER J. TYRRELL

48 Leavenworth Street Waterbury, Connecticut 06702

CERTIFICATION

I hereby certify that on the 13th day of December, 1973, a copy of the foregoing Answer was mailed, via U.S. Mail postage prepaid, to David Salisbury, P. O. Box 1771, Waterbury, Connecticut.



PETER J. TYRRELL

GRIFFIN and BRAYTON ATTORNEYS AT LAW WATERBURY, CONN.

UNITED STATES DISTRICT COURT

FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L.	SALISBURY)	1 .
	Plaintiff)	CIVIL ACTION NO. 15770
	vs.		
	NEW ENGLAND TELEPHONE INC., et al)	
	Defendants)	MOTION TO RECONSIDER DEFENDANT'

The defendants in the above entitled action request this Court to reconsider its November 8, 1973, ruling on their prior Motion to Dismiss in view of the United States Supreme Court decision on December 23, 1974 entitled Jackson v. The Metropolitan Edison Co. U.S. _______, 23LW4110.

THE DEFENDANTS, SOUTHERN NEW ENGLAND TELEPHONE COMPANY WILLIAM J. O'KEEFE

Peter J. Tyrrell
49 Leavenworth Street
Waterbury, Connecticut 06702

CERTIFICATION

I hereby certify that on the 28th day of February, 1975, a copy of the foregoing Motion to Reconsider Defendant's Motion to Dismiss was mailed via U.S. Mail, postage prepaid to David Salisbury, P. O. Box 1771, Waterbury, Connecticut.

PETER J. TYRREY

GRIFFIN and BRAYTON, P.C.
ATTORNEYS AT LAW
WATERBURY, CONN.

<u>O R D E R</u>

	The	foregoi	ng motio	n having	been	heard,	it	is	hereby	ORDERED	:
GRANTED		_	DENIED _		_•						
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						ву т	THE C	COUR	T		
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GRIFFIN and BRAYTON, P.C.
ATTORNEYS AT LAW
WATERBURY, CONN.

IN THE UNITED STATES DISTRICT COURT FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY	
Plaintiff	CIVIL ACTION
vs.	File No. 15, 770
The SOUTHERN NEW ENGLAND TELEPHONE	
COMPANY, INC., ET AL	
Defendants	March 17. 1975

PLAINTIFF'S AFFIDAVIT ON UTILITY ASSESSMENTS BY THE PUBLIC UTILITIES COMMISSION, IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UPON RECONSIDERATION.

I, <u>DAVID L. SALISBURY</u>, Plaintiff in the above entitled action, being duly sworn, do depose and say:

- 1. That I am over the age of eighteen years, and I believe in the obligation of an oath.
- This affidavit is made on my personal knowledge, and all facts contained herein are, the best of my knowledge and belief the truth.
- 3. On Friday, March 7th, 1975, I proceeded to Hartford, Connecticut, to the offices of the Public Utilities Commission of the State of Connecticut.
- 4. Within the accounting offices of said Public Utilities Commission, upon presentation of the letter attached hereto, I was allowed to inspect the records of the said Public Utilities Commission pertaining to the expenses of said Commission, the revenues of the utilities under its jurisdiction, and the amounts assessed those utilities liable therefore for assessment, for the fiscal years shown on the chart also hereto attached.

- 5. I obtained a true and certified of the revenues, expenses and assessments, as set forth on the chart attached hereto.
- 6. The figures set forth on said chart are true and accurate copies taken from said records of the Connecticut Public Utilities Commission.
- 7. Said figures reflect the true extent of the joint participation
 between Connecticut utilities, and the defendant, Southern New England Telephone
 Company in particular, and the Connecticut State Public Utilities Commission.

 FURTHER, DEPONENT SAYETH NOT.

THE PLAINTIFF

DAVID L. SALISBURY, Pro Se

P.O. Box 1771

Waterbury, Connecticut 06720

Dated at Waterbury, Connecticut, this day of March, 1975

STATE OF CONNECTICUT)
ss: Waterbury, Connecticut, March 17, 1975
COUNTRY OF NEW HAVEN)

Personally appeared, David L. Salisbury, the signer and sealer of the foregoing Affidavit, who made truth to the truth of the matters contained therein before me.

RICHARD A. JOSEPH

Commissioner of the Superior Court

CERTIFICATION:

23

I hereby certify that I have mailed, postage prepaid, a true copy of the foregoing affidavit and chart attached thereto, to Atty. Peter J. Tyrrell, counsel for the defendants.

DAVID I. SALISBURY, Pro Se

P.O. Box 1771

Waterbury, Connecticut 06720

David L. Salisbury P.O. Box 1771 Waterbury, Connecticut 06720 March 6, 1975 Public Utilities Commission State Office Building Hartford, Connecticut 06115 Attn: Mr. Henry Mierzwa, Executive Secretary Dear Sir:

Please be advised that I am the Plaintiff in a Civil Action in the Federal Court against the Southern New England Telephone Company.

It is essential for me to ascertain certain facts which are public record involving the defendant Telephone Company.

Pursuant to § 16-49 (a) of the Connecticut General Statutes as amended, the Commission shall apportion and assess fifty-six (56%) percent of the expenses of the Commission not exceeding six hundred thousand (\$600,000.00) dollars against certain utilities, including the defendant.

Therefore, would you kindly supply me with the information needed according to the chart attached, and certify the same as a true and accurate copy of your records so that it may be entered into the Court record.

Thank you for your kind attention to this matter.

Very truly yours,

David L. Salisbury

David L. Salis lung

Federal District Court District of Connecticut Federal Building

New Haven , Connecticut Civil File # 15770

Expenses of the Public Utilities Commission as defined in §16-49 of the Connecticut General Statutes as amended, and apportionment of those expenses among utilities, and the amounts paid by the Southern New England Telephone Company for the years indicated.

YEAR	CON	MISSION	EXPENSES		OTAL AMOUNT ASSES	SSED	SO	AMOUNT PA	ENG. TI	EL. CO.
1970 1 <i>9</i> 7/	Exp. 7 50% 3	12,019	,57	Revi	796,366131		Rev.	284,956,	844,	RATO.
1971	Exp	753,4.	30,69 15,35		877,220,664			128,369,9		,00042944
1000	6xP.	500,6	01,34		500,601.34			7,195,478		00049226334
1973	EXP. 1	1190,21	6.56		1,134,209,488,			719,596	,00	058>65270

SNETCO. P.O. BOY 1562 NEW HAVEN, CONN. 06798

CERTIFICATION.

Certified a true copy

March 7, 1975

CERTIFIED A TRUE COPY

EXECUTIVE SECRETARY
PUBLIC UTILITIES COMMISSION DATE: 3/7/1975

IN THE Supreme Court of the United States October Term, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated, Petitioner,

VS.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation, Respondent.

ON WRIT OF CERTICEARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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DISTRICT COURT:

Civil No. 71-453

Catherine Jackson, On Behalf of Herself and All Others Similarly Situated, Plaintiff

VS.

Metropolitan Edison Company, a Pennsylvania Corporation, Defendant

PETITION—of Plaintiff, by counsel, for leave to proceed in forma pauperis, and

AFFIDAVIT-thereto, and

ORDER—of Court; Leave is granted to Plaintiff Catherine Jackson to file the Complaint and to proceed thereafter in said case until final determination of said matter or until further order of Court, in forma pauperis without the necessity of payment of fees and costs in this proceeding.

COMPLAINT-

MOTION-for class action, and temporary restraining order.

ORDER—of Court; Defendant, its agents, servants and employees are hereby enjoined from summarily terminating and discontinuing Plaintiff's electrical services, without prior notice and hearing, and Defendant is further enjoined and directed to restore Plaintiff's electrical services, and it is further

Ordered that this order will expire within 5 days after entry unless within such time the order for good cause is extended, or unless the Defendant consents that it may be extended for a longer period; and it is further

Ordered that the Plaintiff's motion for a preliminary injunction be set down for a hearing on the 22nd day of October 1971, at 10:00 A.M. at U.S. Courthouse, Scranton, Pennsylvania and it is further

Ordered that copies of this order and of Plaintiff's compla. It submitted therewith be immediately served upon the Defendant.

AFFIDAVIT-of service

PRELIMINARY STATEMENT-of plaintiff.

MINUTE SHEET—re hearing on motion for preliminary injunction. Defendant to file motion to dismiss and hrief thereon within 3 weeks. Plaintiff may file reply brief. In the meantime, further hearing on motion for a preliminary injunction is continued. (N)

MOTION-of Defendant to dismiss, and

NOTICE—motion will be presented to the Court at such time as the Court directs; attached thereto.

MOTION—of the Commonwealth of Pennsylvania, Applicant for Intervention for leave to intervene as a Plaintiff in this action.

DEFENDANT'S MOTION—in opposition to Commonwealth's motion to intervene, and

ORDER—... On November 24, 1971, the Commonwealth of Pennsylvania submitted a motion to intervene in which it was averred that since the outcome of this case would substantially affect all Pennsylvania electricity consumers and that since the Attorney General was the chief legal counsel for the citizens of Pennsylvania, only his intervention could insure adequate representation in this case. However, Commonwealth neglected to attach to its motion the pleading required by

Rule 24, Fe.R.Civ.P. setting forth the claim or defense for which intervention was sought.

The court has personally contacted the Attorney General's office on several occasions on the matter, only to be told the motion would be submitted without any further delay.

The Commonwealth is hereby allowed 10 days in which to submit a proper application of intervention or its prior motion will be stricken.

Copy to counsel of record.

MEMORANDUM AND ORDER—Now, this 30th day of June, 1972, in accordance with memorandum filed this day, defendants motion is granted and plaintiff's claim is dismissed. (n) Copies mailed to Counsel of record.

MOTION—of Plaintiff for Stay or Order and Continuance of Temporary Restraining Order and

NOTICE-of Motion, and

CERTIFICATE—of service thereof

NOTICE OF APPEAL—of I intiff from Order and Memo of June 30, 1972

Copy U.S. Court of Appeals, counsel of record

MEMORANDUM—in Opposition to Plaintiff's Motion for Stay of Order and Continuance of Temporary Restraining Order, and

AFFIDAVIT—of Ernest W. Schleicher, V.P. of Metropolitan Edison Co.

ORDER—Upon consideration of the motion of plaintiff to restore during the pendency of the Appeal in the case

the Temporary Restraining Order issued by this court against the defendant on October 18, 1971, and subsequently extended by agreement of the parties, and

It appearing to the Court that the status quo should be preserved until the disposition of Plaintiff's Appeal by the Court of Appeals for the Third Circuit.

It is Ordered that the Temporary Restraining Order issued on October 18, 1971 and extended by agreement is restored pending determination of plaintiff's Appeal and defendant is enjoined from summarily terminating and discontinuing plaintiff's electrical services, without a prior notice and hearing. Plaintiff is not required to file a Bond. (N)

LETTER—from U.S. Court of Appeals. Appeal docketed to No. 72-1745.

B. COURT OF APPEALS:

Case No. 72-1745

Catherine Jackson, On Behalf of Herself and All Others Similarly Situated, Plaintiff

VS

Metropolitan Edison Company, a Pennsylvania Corporation, Defendant

Forma Pauperis granted in D.C.—see copy of D.C. order dated October 18, 1971 by Nealon, J. granting appellant leave to proceed in forma pauperis, etc.

Copy of Notice of Appeal, rec'd July 17, 1972 filed.

Record rec'd August 9, 1972, filed.

Motion by appellant for hearing of appeal on original record without necessity of reproducing parts thereof, filed. (3 cc). Certificate of service attached.

- Submitted on above motion by appellant. Clerk.
- Appearance of Edward J. Dailey, Esq. for Amicus Curiae (National Consumer Law Center, Inc.), filed.
- Order (Clerk) granting appellant's motion for hearing of appeal on original record without necessity of reproducing parts thereof, provided that there is filed with the brief for appellant, four copies of the opinion, and order from which this appeal is taken, filed.
- Order (Staley, Van Dusen and Rosenn) granting motion by National Consumer Law Center, Inc. for leave to file brief Amicus Curiae, filed
- Brief for Commonwealth of Pennsylvania as amicus curiae, rec'd October 3, 1973, filed. (24 add'l rec'd October 5, 1972)
- Motion by Fellowship Commissions Committee on Consumer and Citizen Complaints as amicus curiae for leave to file its brief out of time (also treated as a motion to file an amicus brief, as well as out of time), filed.
- Argued. Coram: Hunter and Weis, C.J. and Scalera, D.J.
- Opinion of the Court (Hunter * and Weis, Circuit Judges and Scalera, District Judge), fled.
- Judgment affirming the judgment of the D.C. filed June 30, 1972, with costs taxed against appellant, filed.* Judge Hunter was present at the argument of this case but did not participate in the decision.
- Certified judgment in lieu of formal mandate issued.
- Motion by appellant for leave to file petition for rehearing nunc pro tune, filed. (4 copies) service attached.
- Letter dated September 17, 1973 from Paul A. Barrett, Esquire for the information of the court.

- Order (Weis, Circuit Judge and Scalera, District Judge) granting appellant's motion to file petition for rehearing nunc pro tune, filed.
- Petition for Rehearing for appellant, filed. (rec'd 9/13/73) (10 copies) and Memorandum in Support of petition for rehearing en banc, rec'd for information of the Court.
- Petition of Amicus Curiae for rehearing en banc, rec'd for information of the Court
- Supplement to amicus curiae petition for rehearing before the Court en banc, rec'd for the information of the Court.
- Order (Seitz, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Weis and Garth, C.J. and Scalera, D.J.) denying the petition for rehearing, filed.

Record returned to Clerk of D.C.

Receipt for record, filed.

- Notice of filing (on December 3, 1973 of petition for writ of certiorari rec'd from Clerk of Supresse Court, filed. (S.C. No. 73-5845).
- Certified copy of order dated February 19, 1974 rec'd from Clerk of Supreme Court granting the motion to proceed in forma pauperis and granting the petition for writ of certiorari, filed. (S.C. No. 73-5845).

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 71-453

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated, PLAINTIFF

-vs.-

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation, DEFENDANT

COMPLAINT

And Now, comes Plaintiff, Catherine Jackson, by her Attorneys, Alan Linder, Esquire and Albert G. Barnes, Jr., Esquire, in the above captioned matter, and respectfully represents:

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to Title 28 USC Sections 1331 and 1343 (3) and (4). The amount in controversy exceeds the sum of \$10,000.00, exclusive of costs and interest. This is an equitable suit authorized by 42 USC Sections 1983 and 1988, to redress deprivation under color of law of rights, privileges and immunities, secured by the Constitution of the United States.

PARTIES

2. Plaintiff, Catherine Jackson, is an adult individual, age 28, who presently resides at 531 Cleveland Avenue, York, York County, Pennsylvania.

3. Defendant, Metropolitan Edison, is a Pennsylvania Corporation, duly incorporated under the laws of Pennsylvania with registered office at Reading, Berks County, Pennsylvania, and with offices and place of business at Parkway Blvd., York, York County, Pennsylvania, and

is licensed to do business within the Commonwealth of

4. Defendant corporation is a public utility as defined by the Public Utility Law, Act of May 28, 1937, P.L. 1053, 66 P.S. Section 1102, is in the business of providing its customers with electrical service within the City and County of York, Pennsylvania, and is subject to the rules and regulations of the Pennsylvania Public Utility Commission and the Commonwealth of Pennsylvania.

GROUP ALLEGATION

5. Plaintiff brings this action on her own behalf and on behalf of all other persons similarly situated, pursuant to Rule 23A and B (2) of the Federal Rules of Civil Procedure. Said class of persons consists of all low income customers of Defendant whose electrical service has been or will be terminated by Defendant for alleged non-payment of bills for service furnished. There are common questions of fact and law regarding Defendant's unlawful termination of Plaintiff's electrical service, and of the resulting denial of due process of law to Plaintiff and to said class, without prior notice and hearing to determine liability for payment of outstanding bills. The members of this class are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought. The Plaintiff adequately represents the interest of the class.

STATE ACTION

6. Defendant corporation is regulated by the Pennsylvania Public Utility Commission and is subject to the laws of the Commonwealth of Pennsylvania, and has a monopoly in the providing of electrical services within York, Pennsylvania and therefore state action has been applied through Defendant, in this case under the facts set forth, to the prejudice of Plaintiff and the class she represents.

RELIEF SOUGHT

7. This is a proceeding for:

a. Temporary restraining order, preliminary and permanent injunction requiring Defendant to restore Plaintiff's electrical service, and to prevent Defendant from terminating electrical service in the future for alleged non-payment of utility bills, prior to adequate notice and hearing concerning the alleged liability for payment thereof.

b. Declaratory judgement that Defendant's summary termination of Plaintiff's electrical services for alleged non-payment of utility bills, without notice

and hearing, is unconstitutional.

FACTS OF THIS CASE

8. Defendant provided electrical service to Plaintiff at Plaintiff's address at 531 Cleveland Avenue, York, York County, Pennsylvania, and on October 11, 1971 terminated said utility service for Plaintiff's alleged non-payment of the utility bill in the approximate amount of ONE HUNDRED TEN DOLLARS (\$110.00).

9. The billing party or person responsible for said bill, since on or about October, 1970, has been and is one James Dodson, a former co-occupant with Plaintiff, of

the above premises.

34.6

10. Plaintiff has offered Defendant partial payments on account of said bill, but that Defendant has refused said tender, and in fact demands payment in full, prior

to restoration of said utility service.

11. Plaintiff is presently without electrical service, is without the means to make payment in full, lacks the means to make payment in full, lacks the means to move from said premises, and is unable to secure substitute electrical service.

12. Plaintiff occupies the above premises with her two minor children, ages 10 and 12 respectively, and her sole source of income is a Public Assistance grant in the amount of ONE HUNDRED NINETEEN DOLLARS

(\$119.00) received every two weeks.

13. As a result of termination of electrical services, Plaintiff has incurred property damage, and has herself and her children suffered physical harm and mental anguish.

14. Plaintiff and her children will suffer irreperable harm unless said electrical service is restored, and ac-

cordingly, injunctive relief is necessary.

15. There does not exist an adequate remedy at law, and further that due to the crucial issue involved, there is no time in which to attempt to exhaust administrative remedy procedure by filing of a formal complaint with the Pennsylvania Public Utility Commission, the regulatory commission of Defendant.

16. Plaintiff has an adequate defense to her alleged

liability of the utility bill.

17. Nowhere in the rules, regulations or statutes governing Defendant's operations are there provisions which establish any procedure affording Plaintiff and other class members a hearing to determine liability for utility bills or the validity of Defendant's reasons for discontinuance of services, prior to the termination of said services.

DENIAL OF RIGHTS

- 18. Defendant's termination of Plaintiff's electrical service without prior notice and hearing is unconstitutional and unlawful, in that:
- a. Such action is a denial of Plaintiff's due process rights under the 14th Amendment of the U.S. Constitution, in that Plaintiff is afforded no notice or opportunity to be heard.
- b. Such action is a denial of Plaintiff's rights under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, in that no remedy is provided them to contest such discontinuance of services by Defendant solely by reason of their poverty and in absence of any compelling state interest or other reasonable basis for such denial.
- c. Such action deprives Plaintiff of a vital necessity of life, and hence deprives Plaintiff of the right to life

and property under the Ninth Amendment of the U.S.

Constitution.

WHEREFORE, Plaintiff, on behalf of herself and on behalf of all other persons similarly situated, respectfully requests that this Court:

A. Take jurisdiction in this case.

B. Issue a temporary restraining order enjoining Defendant to forthwith restore Plaintiff's electrical service.

C. After hearing, issue a preliminary and permanent injunction enjoining Defendant from terminating electrical service of Plaintiff and the members of her class for alleged non-payment of utility bills, without prior notice

and hearing on liability for payment of said bill.

D. Declare Defendant's summary termination of utility service unconstitutional, while acting under color of state law, in violation of rights afforded Plaintiff and the members of her class under the Due Process and Equal Protection Clauses of the 14th Amendment of the U.S. Constitution.

E. Award such damages as shall have been caused to Plaintiff and class members as the Court shall determine

suffered because of Defendant's conduct.

F. Award such other relief as the Court may deem just and equitable in this matter.

Respectfully submitted,

/s/ Alan Linder ALAN LINDER, Esquire

Dated: Oct. 18, 1971

/s/ Albert G. Barnes, Jr. ALBERT G. BARNES, JR., Esquire Attorneys for Plaintiff Tri-County Legal Services 220 East King Street York, Pennsylvania 17403 (717) 843-8938

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 71-453

[Filed, Nov. 5, 1971, C. H. Campion, Clerk, Per JEC, Deputy Clerk]

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated, PLAINTIFF

-vs-

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation, DEFENDANT

MOTION TO DISMISS

NOW comes the Defendant above-named and by its Attorneys, Nogi. O'Malley & Harris, moves to dismiss the action and in support thereof assigns the following:

1. The Complaint fails to state a cause of action upon which relief can be granted.

2. The Court lacks jurisdiction over the subject matter because

(a) There is no diversity of citizenship between the parties to this action and

(b) The action complained of does not constitute "state action" within the intendment of the Civil Rights Act.

WHEREFORE, Defendant demands that judgment be entered in its favor and against the Plaintiff.

NOGI, O'MALLEY & HARRIS

BY /s/ Russell J. O'Malley BY /s/ [Illegible] Attorneys for Defendant

ORDER

Now, this 30th day of June, 1972, in accordance with nemorandum filed this day, defendant's motion is granted and plaintiff's claim is dismissed.

/s/ [Illegible] United States District Judge

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IN THE

MICHAEL RODAK, JR., CLERK

EME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-5845

THERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner.

V.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

ALAN LINDER, Esquire
EUGENE F. ZENOBI, Esquire
J. RICHARD GRAY, Esquire
Tri-County Legal Services
53 North Duke Street - Suite 457
Lancaster, Pennsylvania 17602
(717) 397-4236

Attorneys for Petitioner

unsel:

ATHAN M. STEIN, Esquire ommunity Legal Services 3 South Juniper Street iladelphia. Pennsylvania 19107 A -2

EXHIBIT

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	Resp poly and with regu	which performs a public function which acts in joint participation the state under extensive state lation.	
		Respondent is a state sanctioned monopoly, placed by the state in a position of favored economic power	. 13
	2.	Respondent performs an important public function, in the supplying of essential electrical services.	. 15
	3.	Respondent acts in joint participa- tion with the state, under extensive state regulation, in pursuing mutual goals under a statutory obligation to furnish "reasonably continuous" electrical services, from which mu- tual benefits are derived.	.:2

- B. The Commonwealth of Pennsylvania is directly involved in the Respondent's termination activities because it has specifically authorized, encouraged and approved such activities, and because it has delegated its statutory responsibility to the Respondent to determine the lawfulness of its own challenged termination practices
 - The Commonwealth of Pennsylvania has specifically authorized and approved the Respondent's challenged termination action. . . .
 - The Commonwealth of Pennsylvania has specifically encouraged the Respondent's termination practices.

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- 3. The Commonwealth of Pennsylvania les delegated to Respondent the Public Utility Commission's statutory responsibility to assure that customers are not arbitrarily and unlawfully deprived of "reasonably continuous" electrical services.
- II. Due Process of Law Requires That Before Petitioner's Essential Utility Services May be Terminated, Petitioner must be Provided with Adequate Prior Notice and Opportunity to be Heard.
 - A. Due process of law is necessary in order to prevent the arbitrary and erroneous deprivation of a statutorily conferred entitlement or property right essential to life and health.

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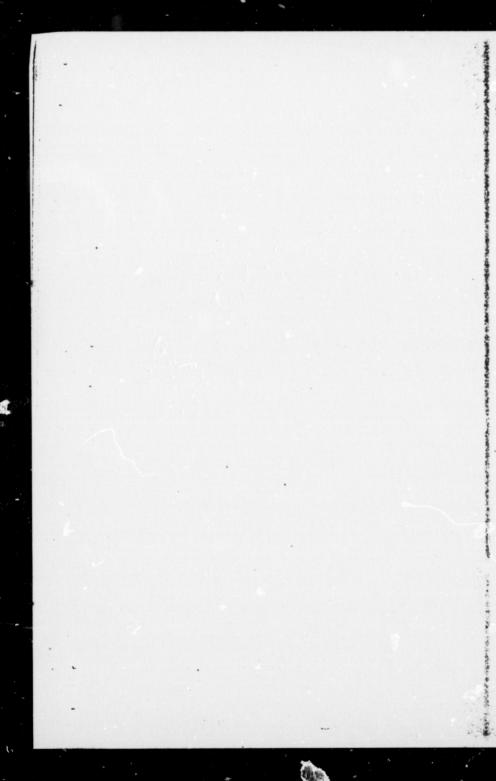
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner.

V.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Memorandum and Order of the District Court, 41ted June 30, 1972, dismissing Petitioner's Complaint, appears in the Appendix (A-64-73) and is reported at lackson v. Metropolitan Edison Co., 348 F.Supp. 954 (M.D., Pa., 1972). The Judgment and Opinion of the

Third Circuit Court of Appeals dated August 21, 1973 affirming the decision of the District Court, appears the Appendix (A-76-92), and is reported at 483 F.2 754 (C.A. 3, 1973).

JURISDICTION

Jurisdiction of the Court below was invoked pursuate to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4) Petitioner's petition for rehearing before the court to banc was denied by the Third Circuit Court of Appeably Order dated October 25, 1973, without opinion, and appears in the Appendix (A-93). The petition for with of certiorari was docketed on December 3, 1973 and was timely filed pursuant to 28 U.S.C. §2101(c). The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES, REGULATIONS AND TARIFFS INVOLVED

Pertinent sections of the Pennsylvania Public Utilin Law, 66 Pa. Stat. Anno., §§451, et seq., 1101 et seq. are set forth verbatim in the attached Appendix. The following sections however, are of special import:

(a) §1171, establishing a duty of furnishing reasonably continuous service:

(b) §1341, conferring powers on the Pennsylvania Public Utility Commission over public utilities; and

(c) §1122, delegating to utilities authority to terminate service without the prior approval of the Commission.

The following Public Utility Commission Tariff and Electric Regulations are also set forth verbatim:

(a) Section II. Public Notice of Tariff Changes;

(b) Section VIII. Discount for Prompt Payment and Penalties; and

(c) Rule 14D. Access to Meters.

The termination of service tariff of Metropolitan Edison Company Electric Tariff, Electric Pa. P.U.C., No. 41, Rule 15, is also set out in the attached Appendix.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Respondent public utility acts under color of state law when it terminates a customer's electrical service for nonpayment of a disputed bill, where such utility has the following characteristics and the following relationship to the Commonwealth of Pennsylvania:

(a) It is a state sanctioned monopoly placed by the state in a position of favored economic power;

(b) It performs a public function in the supplying of essential electrical services;

(c) It acts in joint participation with the state, under extensive state regulation; in pursuing mutual goals, under a statutory obligation to furnish "reasonably continuous" electrical services, from which mutual benefits are derived;

(d) The state has specifically authorized, approved and encouraged the Respondent's challenged

termination practices;

(e) The state has delegated to the Respondent its statutory responsibility to assure that customers are not arbitrarily and unlawfully deprived of "resonably continuous" electrical services.

II. Whether due process of law requires that Petitioner must be provided with adequate notice and opportunity to be heard before her essential utility ervices, which constitute a statutorily conferred entitlement or property right, may be terminated by Respondent for nonpayment of a disputed bill.

STATEMENT OF THE CASE

This case was filed by Petitioner as a civil rights action pursuant to 42 U.S.C. §1983, challenging the discontinuance of her electrical services by Respondent on October 11, 1971, in the absence of due process of law.

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Petitioner, a welfare recipient, had been a residential utility customer of Respondent Metropolitan Edisc-Company since March, 1969, when she moved into her home with her two minor children. (A-22). Although Mrs. Jackson was purchasing her home, she also share: some expenses with a co-occupant, one Dodsea (A-22,32). The electric bills were placed in Mrs. Jackson's name until September 1970, after which time they came to Petitioner's home in Dodson's name (A-24), who had assumed full responsibility for payment. Petitioner had been informed by Dodson that he was paying the bills and she believed this to be the case. (A-31, 32). Mrs. Jackson was not informed either by Dodson or the company that the bills were not being paid. (A-24). Although Dodson moved from the premises in August 1971, no electric bills came to Petitioner's home through October 11, 1971, the time of the termination of the services. (A-23, 33).

On Thursday, October 6, 1971, four days prior to the termination of her electric service, representatives of the Respondent company came to Petitioner's home looking for Dodson (A-24). Mrs. Jackson was informed by one of the representatives that there was money owing and that he would return the following Monday to collect \$30.00, although no mention was made of

¹See Plaintiff's In Forma Pauperis Petition and Affidavit file! with and granted by the District Court on October 18, 1971.

total amount allegedly owing (A-25).2 However, on Monday, this representative failed to come, and tead, company workmen came early in the morning disconnect the electricity at the pole for nonpayent of the bill. (A-25). Thus, Mrs. Jackson's first tice of termination was when she walked out her ont door and asked the utility workmen what they me doing. Id. Petitioner was not able to reach espondent's representatives whom she called at the mpany as well as at home in order to have the service instated. (A-25, 26).

Mrs. Jackson received no written or oral notice from e company prior to the termination of her service3 4-25, 26), informing her of the termination and asons therefor, or of opportunities to contest the emination. Significantly, Mrs. Jackson was pover even nade aware of the exact amount allegedly owing.

A-25).

Petitioner and her children suffered substantial harm s a result of the unexpected termination of her lectrical service (A-27). Mrs. Jackson's electricity was hut off for eight days until the district court granted a emporary restraining order on October 18, 1971. A-13, 14). During this eight day period, Mrs. Jackson

²Although some mention of possible "tampering" was made by the company representative, the Court specifically found no oridence of its applicability to this case (A-89, n. 3).

³The Court of Appeals noted that the termination of Petitioner's service did not occur until after she had been "contacted" by two representatives and had been made "aware" of "irregularities" in her account. 483 F.2d at 761. However, the representatives at no time informed her that she was in imminent Enger of having her electricity terminated for nonpayment of a all, the amount of which they never informed her.

and her children had no lighting, no heat⁴ and no har water for bathing or cooking (A-27). As a result of the lack of heat, Mrs. Jackson's children caught colds and had to be taken to the doctor (A-27).

Following the termination of Petitioner's utility 1971, (A-26), and ha October 11, service on unsuccessful attempts at reinstatement of service Petitioner filed suit against Respondent in the United States District Court for the Middle District of Pennsylvania, seeking damages, declaratory and is junctive relief to enjoin Respondent from terminatize service for nonpayment of a disputed bill in the absence of notice and opportunity for a hearing concerning the merits of the claim. On October 18, 1971, the Court issued a Temporary Restraining Order, ordering Respondent to reinstate Petitioner's service. On October 22, 1971, following a hearing on issuance of a preliminary injunction, the parties stipulated to 25 extension of the restraining order pending the District Court's decision (A-33, 34). On November 5, 1971, Respondent filed a Motion to Dismiss (A-64), and ca June 30, 1972 the lower court issued its Memorandum and Order dismissing Petitioner's Complaint for lack of subject matter jurisdiction, in that the Court held that the Respondent utility did not act under color of law (A-65, 66).

On July 13, 1972, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit (A-74). The Attorney General of the Commonwealth of Pennsylvania was granted leave to submit a brief amicus curis in support of the Petitioner's position (A-5). On August 7, 1973 the District Court

entinued the electronic termination as argued be 1973, and, on as Opinion and District Court whearing before 1973, that pet a Petition for then granted Petitioner was puperis (A-94).

1. State Actination A sifting discumstance 365 U.S. 71 Respondent terminated payment of

Metropol permitted to in an exclusion and exclusion wealth of the result of the result of the Respurition of the Respurition arbitrarily disputed when the

⁴Mrs. Jackson used her oven to partially heat her home downstairs.

h. is. R U.S. 225 (1961).

Temporary Restraining Order pending of Petitioner's appeal (A-75). The case fore the Court of Appeals on May 4, August 21, 1973, the Court handed down defect of Judgment affirming the Order of the (A-76, 77). Petitioner moved for a rethe court en banc, and on October 25, action was denied without opinion (A-93). Writ of Certiorari was filed with and was by this Court on February 19, 1974 and as granted leave to proceed in forma

SUMMARY OF ARGUMENT

on:
of the facts and a weighing of the s, Burton v. Wilmington Parking Authority,

4).

the Petitioner's electrical services for nona disputed bill. itan Edison is a state sanctioned monopoly, by the state to engage in the utility business sive geographical area, pursuant to a grant of ate of public convenience" by the Common-Pennsylvania. 66 Pa. Stat. Anno. §1121. As a he certificate, the Respondent is placed in a of favored economic power. Consequently, ustomers have no alternative means of service, ondent has little incentive to refrain from terminating service for nonpayment of a bill. Thus, state action has been found to exist government places monopoly power in private ailway Employees Department v. Hanson, 351 5 (1956); Lathrop v. Donohue, 367 U.S. 820

5 (1961), leads to the conclusion that the acted under color of state law when it

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The supplying of electrical services is traditionally public function. Munn v. Illinois, 94 U.S. 113 (1872). Such electrical services unquestionably constitute "necessity of life", Jones v. City of Portland, 245 U.S. 217 (1917); Palmer v. Columbia Gas of Ohio, 479 F. 2153 (C.A. 6, 1973), as can be seen in the recession newspaper reports of the deaths of elderly personnewspaper from the termination of such services. See The New York Times, Dec. 26, 1973.

The Public Utility Law establishes a duty upon utilities to provide "reasonably continuous" service a the public interest. 66 Pa. Stat. Anno. §1171. Quit often, the provision of such service is undertaken by governmental bodies directly.

A finding of state action has thus often resulted from the performance of a public function by a "private" entity. Marsh v. Alabama, 326 U.S. 501 (1946); Evara v. Newton, 382 U.S. 296 (1966). The furnishing c! utility services is similarly a public function justifying a finding of state action. Ihrke v. Northern States Power Company, 459 F.2d 566, 569 (C.A. 8, 1972), cert. granted, vacated as moot, 34 L.Ed.2d 72 (1972).

In addition, the quasi-judicial function of determining the lawfulness of the deprivation of a operty under state authority, is another governmental function performed by Respondent, further justifying a finding of action under color of law herein.

Metropolitan Edison further acts in joint participation with the state, under extensive state regulation, in pursuing mutual goals, under a statutory obligation to furnish "reasonably continuous" service, from which mutual benefits are de ived. In this regard, the Commonwal of the Respondent's operations, similar to

relationship in Burton v. Wilmington Parking thority, supra. Hence, the Pennsylvania Public Utility minister regulates the setting of utility rates and the mishing of services; equires all utilities to file tariffs the Commission and obtain approval thereon; and a general administrative powers and authority, similar those of a principal to an agent, including the veto over utility contract provisions. 66 Pa. Stat. and. § § 1141, 1142, 1171, 1341, 1360.

In pursuing their mutual goals of furnishing "reamably continuous" electrical services, both the espondent and the state derive mutual benefits derefrom. The Respondent receives monopoly status, a curanteed fair rate of return, and rights of eminent domain and entry on private property. 66 Pa. Stat. anno. §§1121, 1124, 1141, P.U.C. Elec. Reg., Rule 4D. It is additionally granted power to promulgate its own regulations which have the effect of law. 66 Pa. Stat. Anno. §1171; Cray v. Pa. Grayhound Lines, 177 Pa. Super 275, 110 A.2d 892 (1955).

In return, the Commonwealth of Pennsylvania is assured that its citizens receive necessary utility services at a reasonable cost. The state additionally benefits from summary terminations which reduce utility costs and hence rates. At the same time, the state benefits from threatened terminations, since disputed bills are then quickly paid, thereby increasing utility revenues in which the state shares. See *Ihrke v. Northern States*. Ower Company, 459 F.2d at 568. Finally, the Commonwealth of Pennsylvania directly benefits from the receipt of a fixed portion of the Respondent's revenues, through collection of the Utilities Gross Receipts Tax, 72 Pa. Stat. Anno. §8101.

In addition to the above, the Commonwealth of Pennsylvania has specifically authorized and approved Metropolitan Edison's termination practices. Pursuant a statutory and regulatory authority, 66 Pa. Stat. Analy §§1122, 1171, P.U.C. Tariff Reg. Section VIII, the Respondent's constitutionally deficient termination tariff was filed with and was approved by the Commission, by becoming automatically effective site days after filing. 66 Pa. Stat. Anno. §1148, P.U.C. Tariff Reg., Section II. The Commission's approve in conjunt on with its silence of Metropolitan Edison's termination tariff, thus warrants a finding of state action similar to that in Public Utilities Commission a Pollak, 343 U.S. 451 (1952); Palmer v. Columbia Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 6, 1973); Washington Garof Ohio, 479 F.2d 153 (C.A. 4, 1971).

Furthermore, the Commonwealth of Pennsylvania has specifically "encouraged" Metropolitan Edison's termination practices. See Reitman v. Mulkey, 387 U.S. 369 (1967); McCabe v. Atchison Topeka and Santa Ic R. Co., 235 U.S. 151 (1914). In this case, the Pennsylvania Public Utility Law exempts utilities from the usual requirement of obtaining prior Commission approval for termination of services for nonpayment of a bill. 66 Pa. Stat. Anno. §1122. In addition, the Commission authorizes utilities to promulgate their own termination tariffs, and grants them the right of entry onto customers' premises, which does facilitate the termination procedure. Certainly, because the Respondent has been granted monopoly power, it has little incentive to refrain from arbitrary termination practices

Finally, the state has delegated to Metropolitan Edison its statutory obligation to assure the provision of "reasonably continuous" services, and has further delegated its responsibility to the public to determine whether termination of service for alleged nonpayment

bills is in compliance with existing laws and nstitutional requirements. This "abdication" of duty, rough delegation of authority constitutes state action. ston v. Wilmington Parking Authority, 365 U.S. at 15; See Fuentes v. Shevin, 407 U.S. 67 (1972) at 93.

Due Process of Law:

Due process of law is necessary to prevent arbitrary ad erroneous deprivations of a statutorily conferred ntitlement, which, in this case, consists of the etitioner's statutory right to "reasonably continuous" tility service. Once an entitlement is conferred by the overnment it cannot be taken away in the absence of the process of law, Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg Kelly, 397 U.S. 254 (1970), especially when such entitlement constitutes a necessity of life. Falmer v. Columbia Gas of Ohio, supra.

In view of the numerous instances of utility company errors, employee indifference or hostility, arbitrary atility company termination practices, the availability of legitimate customer defenses and the lack of adequate administrative and legal remedies available to low income consumers, it is readily apparent that the protections of adequate prior notice and opportunity to be heard must be provided to a customer before being deprived of essential utility services. It is submitted that "the stakes are simply too high" to permit unfettered termination practices. Goldberg v. Kelly, 397 U.S. at 266.

Since the receipt of continued utility service is a protected property interest, Board of Regents v. Roth, 408 U.S. 564 (1972), due process of law in utility termination situations requires adequate prior notice of the nature of the dispute, means of resolution of the dispute and of the right to an oral evidentiary hearing, prior to the termination of utility services. Palmer r. Columbia Gas of Ohio, 479 F.2d at 166; Bronson r. Consolidated Edison of New York, 350 F.Supp. 443. 450 (S.D.N.Y., 1972). The customer may be afforded the opportunity for a conference with a company representative and an informal agency hearing, prior to the opportunity for a formal oral hearing.

The remedy of "pay first and litigate later", sanctioned by the Court of Appeals (A-91), is in actuality a "non-alternative", *Bronson*, supra at 449, and is contrary to the teaching of this Court that a wrong will not be permitted to be done merely because it might be undone. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

ARGUMENT

I.

RESPONDENT ACTS UNDER COLOR OF STATE LAW WHEN IT TERMINATES PETITIONER'S ELECTRICAL SERVICES FOR NONPAYMENT OF A DISPUTED BILL.

A finding of action under color of state law requires a comprehensive analysis of the cumulative effects of the various state action indices that are involved in the facts of each particular case.

"Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

See also Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972).

Petitioner submits that a sifting and weighing of the facts and circumstances in this case can lead only to the inclusion that the Respondent did act under color of w when it terminated Petitioner's electrical services.

- A. Respondent is a state sanctioned monopoly which performs a public function and which acts in joint participation with the state under extensive state regulation.
- 1. Respondent is a state sanctioned monopoly, placed by the state in a position of favored economic power.

In Pennsylvania, public utility companies may not engage in business unless a "certificate of public convenience" is conferred upon them by the Pa. Public Utility Commission. 66 Pa. Stat. Anno. §§1121, 1122. Such a certificate may be granted only following a determination by the Commission that the granting of same is necessary or proper for the service, accommodation, convenience or safety of the public. Id, §1123. The certificate of convenience sets forth the description of the service and the exclusive territorial limitations of such service. Id, §1121.

The granting of a certificate of convenience or exclusive franchise represents a fundamental restructuring of a private anti-competitive market to one under governmental control.⁵ It is apparent that such state authorized monopoly status results in the

^{*}As commerce developed in medieval England, artificial monopolies tended to disappear, leaving only the "natural monopolies", which by their nature, would not admit of free competition, such as water, gas, telephone and electric companies." Burdick, "The Origin of the Peculiar Duties of Public Service Companies", 11 Columbia L.R. 514 (1911). Because people were "compelled" to resort to these natural monopolies, to obtain a "necessity" such as fuel, "which could otherwise be obtained with great difficulty and at times perhaps not at all", Jones v. City of

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enjoyment by the utility of a favored economic position. As a result of the lack of competition, the utility customer is afforded little bargaining power, and consequently the utility has little incentive to refrain from terminating service for nonpayment of a disputed bill. Thus, the utility company may elect to terminate a customer's services knowing that the "power, property and prestige" of the state is behind

Portland, 245 U.S. 217, 224 (1917), the states found it necessary to control the potential evil of "odius" common law monopolies. Shepard v. Milwaukee Gas Light Co., 6 Wis. 526, 534 (1858). in the "public interest", Munn v. Illinois, 94 U.S. 113 (1877); Nebtar v. New York, 291 U.S. 502 (1934), Wyman, "The Law of Public Callings as a Solution to the Trust Problem", 17 Harvard L.Rev. 156 (1904); Arterburn, "The Origin and First Test of Public Callings," 75 U. Pa. L.Rev. 411 (1927).

⁶ It is interesting to note that the successful attempts of public utilities to exclude themselves from the anti-trust laws have not been on the grounds that they are not monopolies, but rather on the basis that their monopoly activity constitutes "state action". See Gas Light Co. of Columbus v. Georgia Power Co., 440 F.24 1135 (C.A. 5, 1971) cert. den., 405 U.S. 969 (1972) (state action due to "intimate involvement" of state in defendant's rate making process), and Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F.2d 248 (C.A. 4, 1971) (state silence constituting "approval" of utility's activities).

The dangers of unfettered termination are great, for as the court recently observed "[if a creditor] knows that he is dealing with uneducated, uninformed consumers with little access to legal help and familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property however unwarranted - may go unchallenged and the [creditor] may feel that he may act with impunity." Fuentes v. Shevin, 40° U.S. 67 (1972), at 83, n. 13.

⁸ Wood v. City of Auburn, 87 Me. 287, 32A. 906 (1895).

action. Burton v. Wilmington Parking Authority, U.S. at 725.

t is not surprising therefore that state action has a found to exist in situations where the government tes monopoly power in the private hands. Lathrop v. mohue, 367 U.S. 820 (1961); Railway Employees partment v. Hanson, 351 U.S. 225 (1956); Lavoi v. 1964, 457 F.2d 7 (C.A. 1, 1972).

 Respondent performs an important public function in supplying essential electrical services.

The supplying of electrical services, often undertaken rectly by governmental bodies, is a public function, rticularly in view of the fact that the provision of ility service has always been regarded as a "public lling." Thus, as stated by one in its analysis of this age:

"It is, of course, fundamental that justification for the grant by a state to a private corporation of a

See Note: "Constitutional Safeguards for Public Utility ustomers", 48 NYU L.Rev. 493 (1973); Wyman, Public Service orporations (1911). Thus, when private property is "affected ith a public interest, it ceases to be juris privati only" and ecomes clothed with a public interest when it is used in a anner to make it of "public consequence to the community at arge." Munn v. Illinois, 94 U.S. at 126, quoting from Hale, De brtibus Maris, 1 Harg. Law Tracts 78. (emphasis original). lowever, when such functions are performed by private parties hey become subject to governmental regulation. Barnes, "Governcental Regulation of Public Service Corporations," 3 Marquette L. Rev. 65 (1918). Furthermore, it is immaterial that the business was stablished prior to imposition of the state regulatory control. funn v. Illinois, 94 U.S. at 133. The important issue is the "type" of service being provided, rather than whether a public or private entity actually furnishes the service. Jones v. City of Portland, 245 U.S. at 233. See also Moody's Public Utility Manual, §38 (1912).

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right or franchise to perform such a public utility service, as furnishing transportation, gas, electricity or the like, on the public streets of the city, is that the grantee is about the public's business. It is doing something the state deems useful for the public necessity or convenience." Boman v. Birmingham Transit Co., 280 F.2d 531, 535 (C.A. 5, 1260). 10

There can be little doubt that in furnishing utility services, public utilities provide a "necessary service" that is beneficial to the public. Note, supra, 42 N.Y.U.L.Rev. at 50%. Thus, in Jones v. City of Portland, 245 U.S. 217, 1917) at 223-225, this Count recognized that Authoristituted an "indispensible necessity of life" whose absence would endanger the community as a whole, because "heat is as indipensible to the health and comfort of the people as a light or water." Also see Moose Lodge 107 v. Irvis, 40% U.S. at 173 in this regard.

Most courts that have addressed themselves to the issue have found continued utility services to constitute a necessity of life. Thus, in *Bronson v. Consolidates Edison Co. of New York*, 350 F.Supp. 443 (S.D.N.Y. 1972) at 447 the court found "beyond doubt" that electric service can become "vital to the existence".

service was a public function and therefore constituted is important index of state action. See Bronson v. Consolidated Edison of New York, 350 F.Supp. 443 (S.D.N.Y., 1972). Stanford v. Gas Service Co., 346 F.Supp. 717 (D., Kan., 1972). Davis v. Weir, 328 F.Supp. 317, 359 F.Supp. 1023 (N.D., Ga., 1971, 1973); Palmer v. Columbia Gas of Ohio, Inc., 479 F.21, 153 (C.A. 6, 1973); Ihrke v. Northern States Power Co., 455 F.2d 566 (C.A. 8, 1972) cert. granted, vacated as moot, 34 LF2 2d 72 (1972).

le the court in Stanford v. Gas Service Co., 346 upp. 717 (D., Kan., 1972) at 720 noted that the attended shelter affects life itself. Similarly, the direct court in Palmer v. Columbia Gas of Ohio, 342 upp. 241 (N.D., Ohio, W.D., 1972) at 247, stated at the lack of heat in the winter time has "very ious effects upon the physical health of human ings, and can easily be fatal." In like manner the urt in Davis v. Weir. 328 F.Supp. 317, 359 F.Supp. 23 N., Ga., 1971, 1973) at 322, found that a mant would "suffer a serious loss" without the benefit water services which constituted a necessity. See also almer v. Columbia Gas of Ohio, 479 F.2d 153 (C.A. 6, 273) at 168, and Wood v. City of Auburn, 87 Me. at 322.

The common law duty to furnish adequate utility ervice at a fair price was incorporated into state public tility laws.¹³ Thus, the Pennsylvania Public Utility

[&]quot;In this regard, in noting electrical service to be a processity of life, one has to look no further than the evening newspaper for shocking articles reporting the deaths of families and of adderly persons whose utility services had been terminated during the Winter of 1973. See "Tragedies: A Winter's Tale", Newsweek, p. 28 (Jan. 8, 1974), and "Man, Seventy-one Freezes to Death After Utility Shuts Off Gas", United Press International, appearing in Boston Globe, p. 17 (Feb. 9, 1974).

¹²The above characterizations of utility service as a necessity of life are in sharp contrast to the casual observation of the Third Circuit that the absence of such service does not pose a "threat" to the life of the occupants, and that such service constitutes a convenience, rather than a necessity in urban life. (A-88).

¹³At common law, "a person by holding himself out to serve the public, generally assumed two obligations - to serve all who applied; and if he entered upon the performance of the service, to do it in a workmanlike manner." Burdick, supra, note 5 at

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Law, 66 Pa. Stat. Anno. §1101, et seq., imposes a duty on all public utilities to provide "reasonably continuous" service at a fair price to all customers. It §§1141, 1171. Such an obligation is inherent in every certificate of public convenience, and hence, a public service corporation may not operate only "when the weather is pleasant" or when there is a "chance for profit." Columbo v. Pa. P.U.C., 159 Pa. Super. 483, 44 A.2d 59 (1946). Similarly, the Commonwealth of Pennsylvania, through its Public Utility Commission, has a statutory duty to assure that public utilities furnal "reasonably continuous" service, 66 Pa. Stat. Anno §§452, 1171, 134.

It is precisely occause a public utility acts in the public interest in supplying essential utility services

158. Also see Wyman, supre, note 5 at 166, where it is stated that "the situation demands this law, that all who apply shall be served, with adequate facilities for reasonable compensation and without discrimination; otherwise in crucial instances of oppression, inconvenience, extortion and injustice there will be no remedies for those industrial wrongs."

one of the main factors to be considered in distinguishing the case from that of Columbia Broadcasting System v. Democrate National Committee, 36 L.Ed.2d 772 (1973). In the CBS case least three members of this Court failed to find governmental expressed in the refusal of a broadcaster to accept a paid editoral expressed in the Federal Communications Act that broadcast licensees were not to be treated as common carriers and were not obligated to accept whatever is tendered by members of the public.

¹⁵Such an obligation consists of the "primary duty" to protect the interests of utility customers, as the "primary object" of the public service laws is at all times to serve the public Ridley Township v. Pa. P.U.C., 172 Pa. Super. 472, 94 A.2d 168 (1953).

the authority of the Public Utility Law, that it to be permitted to terminate such services without process protections to the customer. Hence, the process protections to the customer. Hence, the process protections to the customer. Hence, the process of certain courts to find state action primarily use the utility was deemed by them to be provided by purely private economic interests, and provided by purely private economic interests, and provided in the public utility is legally permitted to act by pursuant to its own private interests, as compared to be being required to act in the public interest. See eacher J., dissenting in Lucas v. Wisconsin Electric per Co., 466 F.2d 638 (C.A. 7, 1972) cert. den. 34

d.2d 696 (1973).

ince this Court has numerous times held that a rate organization exercising significant control over operation, management or supply of a governmental public service acts under color of law, 17 a finding of

**Kadlec v. Illinois Bell Telephone Co., 407 F.2d 624 (C.A. 7, 69), cert. den. 396 U.S. 846 (1969); (however, see Kerner J. 69), cert. den. 396 U.S. 846 (1969); (however, see Kerner J. 7, 7, 1972); Taglianetti v. New England Tel. and Tel. Co., 81 1, 103 A.2d 67 (1954); Lucas v. Wisconsin Electric Power 1, 466 F.2d 638 (C.A. 7, 1972) cert. den. 34 L.Ed.2d 696 1, 466 F.2d 638 (C.A. 7, 1972) cert. Commonwealth Edison Co., 457 F.2d 189 (C.A. 7, 1972) cert. 1, 34 L.Ed.2d 148 (1972); Also see Martin v. Pacific 1, 24 1, 25 1, 26 1, 27

Wixon v. Condon, 286 U.S. 73 (1932); Terry v. Adams, 345 (25. 461 (1953) (running of elections); Marsh v. Alabama, 326 (25. 461 (1953) (running of elections); Marsh v. Alabama, 326 (25. 501 (1946) (operating a company town); Evans v. Newton, 358 U.S. 296 (1966) (maintaining a nunicipal park); Cooper v. Rivon, 358 U.S. 1 (1958) (providing tree education); and Food (1940), and Food (1940), San Valley Plaza, 39° U.S. 308 (Inployees Local 590 v. Logan Valley Plaza, 39° U.S. 308 (1968) (shopping center); Smith v. Allwright, 321 U.S. 649 (1944). Also see Hampton v. City of Jac sonville, 304 F.2d 320 (1944). Also see Hampton v. City of Jac sonville, 304 F.2d 320 (1944). (state fair); Baldwin v. Morgan, 287 F.2d 750 (C.A. 5, 1964) (state fair); Baldwin v. Morgan, 287 F.2d 750 (C.A. 5, 1961); McQueen v. Drucker, 438 F.2d 781 (C.A. 1, 1971) (public commission, 397 F.2d 33 (C.A. 6, 1968) (horgan); and Smith v. Holiday Inns of America, 336 F.2d 630 (C.A. 6, 1964) (hotel).

state action is similarly compelled in the instant car, where the Respondent is under a statutory obligation; furnish a service which is necessary to life. 15 h performing this and other public functions, 19 Metropolitan Edison thus acts under color of state law.

utility services was found to be an important index for a fine of state action in Bronson v. Consolidated Edison of New York supra; Stanford v. Gas Service Co., supra; Davis v. Weir, supra Palmer v. Columbia Gas of Ohio, supra; and Ihrke v. Norther States Power Co., supra.

19 In addition to the performance of a public function in 5.3 plying utility service, the Respondent has also been authorized by state to perform governmental function ± a the adjudication of when private property is to be seized; r.t. then itself is permitted to carry out that seizure and state sanctioned deprivation of property. Thus, courts have often he's that statutorily authorized actions by a private person, resulting in the seizure or deprivation of property interests, which actua possesses the characteristics of an act by the State, constituta state action. Such action may take the form of entry on: private property, as the summary seizure of tenants' properts by landlord: Hall v. Garson, 430 F.2d 430 (C.A. 5, 1970); Dielet v. Levine, 344 F.Supp. 823 (D., Neb., 1972); Gross v. Fox, 34 F.Supp. 1164 (E.D., Pa., 1972); or summary seizure of property by an innkeeper: Klim v. Jones, 315 F.Supp. 109 (N.D., G.'. 1970); or detention of an automobile by a garagema-Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (CA 2, 1973); Mason v. Garris, 360 F.Supp. 420 (N.D., Ga., 1973). at service of court process by private persons: United States 1 Wiseman, 445 F.2d 792 (C.A. 2, 1971); or the arrest of person by a bail bondsman: Hill v. Toll, 320 F.Supp. 185 (E.D., Pa. 1970). Hence, it is the delegation by the state to a private party of the decision making process to carry out the seizure of the property of another, following a contractual dispute, that he resulted in a finding of action under color of law. Fuentes * Shevin, 407 U.S. 67 (1972). Thus, when a private party 5

3. Respondent acts in joint participation with the state, under extensive state regulation, in pursuing mutual goals under a catutory obligation to furnish "reasonably continuous" electrical services, from which mutual benefits are derived.

Since both the Respondent and the Commonwealth Pennsylvania have the mutual goals and mutual sligations of furnishing "reasonably continuous" fility services at a fair price to the utility customers, and Pennsylvania is no less involved to Metropolitan Edison's activities than was the State of Commonwealth of Pennsylvania is no less involved to Metropolitan Edison's activities than was the State of Commonwealth of Pennsylvania is no less involved to Metropolitan Edison's activities than was the State of Commonwealth of Pennsylvania is no less involved to the action purposes in the restaurant business in State action purposes in the restaurant business in State of V. Wilmington Parking Authority, 365 U.S. at 124.20

In pursuing their mutual goals, it is also apparent that the Commonwealth of Pennsylvania is "significantly involved" in every aspect of Metropolitan Edison's operations and activities. The Commonwealth of Pennsylvania, through its Public Utility Commission,

enabled by the state to deprive others of due process of law, a finding of state action is compelled, since the state has provided that method for resolution of such disputes. Boddie v. Connecticut, 401 U.S. 371 (1971).

²⁰In determining whether state action existed based in part upon joint participation in a particular activity, this Court has noted that the actor need not be an "officer" of the state, since it is enough if he is a "willful participant" with the state. *United* States v. Price, 383 U.S. 787 (1966) at 794. Furthermore, the hydroment of the state need not be "either exclusive or direct", since state action can be found even though the participation of the state is "peripheral" or its action is only one of "several cooperative forces" resulting in the constitutional violations. *United States v. Guest*, 383 U.S. 745 (1966).

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extensively regulates and controls Metropolitan Edisor by first granting it a "certificate of public convenience" in order for it to operate. 66 Pa. Stat. Anna §§1121-1123. The Commission further controls the setting of rates by all utilities. Id, §1141. Every public utility must file its tariffs with the Commission. 1: §1142. Furthermore, no public utility may subject 2. customer to any "unreasonable prejudice or 45 advantage" as to rates, Id. §1144. Of major important is the fact that the Commission has complete power over the character of utility facilities and the furnishing of service by the utilities. Id, §1171. In addition, no public utility may subject any customer to are unreasonable prejudice or disadvantage in the furnishing of service. Id, §1172, and the Commission may further require reasonable standards for service. Id, §1182. · upon its own motion or upon any complaint & "unreasonable, unsafe, inadequate, insufficient or un reasonably discriminatory" service. 66 Pa. Stat. Anno §1183.21

The Commission has general administrative power and authority to "supervise and regulate" all public utilities doing business within the Commonwealth. 66

the Commission has extensive regulatory and supervisory powern over utility operations, accounting and budgetary matters, 66 Pt Stat. Anno. §1211, and, at all times has access to and may inspect and examine all utility accounts, books, maps, investories, appraisals, valuations or other reports, documents and memoranda, and may require the filing of such material with the Commission. *Id*, §1217. The Commission also has supervisice over utility securities and obligations. *Id*, §1241, and additionally has power to control a utility's relations with affiliated interests. *Id*, §§1271, 1276.

Stat. Anno. §1342.²² In fact, the Commission's onship with and control over utility companies is ingly similar to that of a principal and agent ionship.²³

is apparent from the above that Metropolitan on is not a typical private business entity, since, in tion to state licensing, every significant aspect of its ration is subject to comprehensive statutory and inistrative regulation. This comprehensive regulatory are demonstrates the complete involvement of the in and its joint participation with the Respondent

In this regard, it is interesting to note that the Court's ding of state action in *Stanford v. Gas Service Co.*, 346 upp. at 721, was based primarily on the fact the utility was ject to extensive regulatory control, based on a Kansas state, pursuant to which the utility terminated its customer's vice. That statute was very similar to Section 1341 above, and oxided:

[&]quot;Power, Authority and Jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the public utilities...and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." K.S.A. §66-101.

The Commission is further vested with the power to enforce of the provisions of the Act, including the "full intent nereof", and to "rescind" or "modify" any regulations or reders. 66 Pa. Stat. Anno. §1342. The filing of reports may be required of utilities. Id, §1345, and they are likewise required to observe and obey all regulations and orders of the Commission.

§1347. Further, the Commission is empowered to "vary, efform or revise" the terms of any contract entered into by stillities which concerns the "public interest and the general well exing" of the Commonwealth. Id, §1360. Finally, the Commission is empowered to hear, investigate and resolve all complaints on behalf of or against any public utility in violation of any law which the Commission has jurisdiction to administer. Id, §1391, 1395, 1398.

in the supplying of electrical services.²⁴ The Peter sylvania regulatory scheme thus goes far beyond the simple notice filing requirement which was footh insufficient for state action purposes in Kadlec & Illinois Bell Telephone Company, 407 F.2d 624 (C. § 7, 1969) cert. den. 396 U.S. 846 (1969).²⁵

In addition to the partnership role of the Respondent and the state in the furnishing of essential electrical services, mutual benefits are conferred upon these joint venturers through the provision of such services. Similarly, the finding of state action through joint participation in Burton v. Wilmington Parking Authority, supra, was based in part upon the fact that benefit were mutually conferred upon the state and the private entity in furnishing of the challenged service.

Metropolitan Edison receives distinct benefits from arrangement since it is granted a certificate of convenience or franchise, and monopoly from the state 66 Pa. Stat. Anno. §1121, in an exclusive territory of service. *Id*, §1121, with a guaranteed fair rate of return, *Id*, §§1141, 1171; *City of Pittsburgh v. Fa. P.U.C.*, 182 Pa. Super. 551, 128 A.2d 372 (1957). 252 is further vested with the right of eminent domain. *Id*

²⁴While the concept of "pervasive state regulation" was are deemed to itself constitute the major indicia of state action at this Court in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952) and in *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1973) yet its significance apparently cannot be underestimated in the of this Court's statement in *Columbia Broadcasting System to Democratic National Committee*, 36 L.Ed.2d 772 (1973) at 742 that Congress did not establish a regulatory scheme for broadcasticeses "as pervasive as the regulation of public transportation *Pollak*."

²⁵If the utility company is to be given extensive powers # conjunction with its public responsibilities, it must be remen

1124, and the right of entry onto customers' private toperty for the purpose of maintenance and operation its equipment, Pa. P.U.C. Electric Regulation, Rule 4D. Finally, the Respondent is authorized by statute o promulgate its own regulations which have the effect flaw, Cray v. Pa. Greyhound Lines, 177 Pa. Super. 275, 10 A.2d 892 (1955), and which are subject only to the estraints of state laws. Id. §1171.

Likewise, certain substantial benefits are conferred opon the Commonwealth of Pennsylvania, through the furnishing of utility service by the Respondent. The gate is assured that its citizens will receive reasonably continuous and necessary utility services at reasonable frices through provision of such services by public utility companies. Furthermore, the state has an interest in seeing to it that its citizens receive such services at the lowest possible rate, while still yielding a fair rate of return to the utility. Furthermore, the control of rates to the public is another major benefit derived by the state from utility regulation. Since relatively unfettered terminations reduce the utility's operating costs, and since this reduction would be reflected in lower rates, the termination of services serves to further the state's regulatory interests.26 The state thereby

bered that "Along with power, goes responsibility," and thus, when the actor's authority is derived in part from the "Government's thumb on the scales", the exercise of such authority and power becomes "closely akin to its exercise by the Government itself." American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

²⁶See, Note: "Fourteenth Amendment Due Process in Terminations of Utility Services for Nonpayment," 86 Harvard LRev. 1477 (1973).

ironically receives a direct pecuniary benefit from the specific act complained of.

In addition, since the utility is a monopoly, its threat of termination for nonpayment of a bill has a tremendously coercive impact and often results in immediate payment of many disputed bills. Since the threatened terminations can result in an increase of revenue, and since the state receives a share of the utility's gross revenues, pursuant to 72 Pa. Stat. Anno. §8101, such threatened terminations result in a direct benefit to the state.²⁷

Finally, it is apparent that the Commonwealth of Pennsylvania has a direct financial interest in the revenue of the Respondent. Although the Respondent corporation pays corporate net income tax and capital or franchise tax and property taxes, as do other Pennsylvania corporations, it also pays an additional and unique tax, i.e., the Utilities Gross Receipts Tax. 72 Pa. Stat. Anno. §8101, et seq. Every public utility. including Respondent, must pay to the Commonwealth of Pennsylvania, a tax of forty-five mills upon each dollar of its gross receipts from the sale of its utility services, including electricity. 72 Pa. Stat. Anno. §8101. It is submitted that the Utilities Gross Receipts Tax is no different than the five percent of gross profits paid to the City of St. Paul by the Northern States Power company in Ihrke v. Northern States Power Co., supra. As in Ihrke, such an "arrangement" makes the state a "direct beneficiary" of the utility's business. especially since the state had the power to set the

²⁷This rationale was specifically adopted by the Eighth Circuit as a basis for its finding of state action in *Ihrke v. Northern States Power Co.*, supra, 459 F.2d at 568.

dility's rates and to regulate its operations. Ihrke,

espra, 459 F.2d at 570.28

Therefore, whether or not the Respondent intended to be a "partner" in rnishing utility services with the Commonwealth, is immaterial. It is sufficient for state ction purposes that the two entities operate in a symbiotic relationship", Moose Lodge 107 v. Irvis, 407 U.S. at 166, in the provision of such services.29

- B. The Commonwealth of Pennsylvania is directly involved in the Respondent's termination activities in that has specifically authorized, encouraged and approved such activities, and it has delegated its statutory obligation to the Respondent to determine the lawfulness of its own challenged termination practices.
- 1. The Commonwealth of Pennsylvania has specifically authorized and approved the Respondent's termination action.

A finding of state action is compelled when the state regulatory agency specifically approves the utility's

²⁸See also Hattell v. Fublic Service Co. of Colorado, 350 F.Supp. 240 (D., Colo., 1972); Buffington v. Gas Service Co., ·F.Supp.- (W.D., Mo., W.D. 1973); Salisbury v. New England Tel. and Tel. Col, 2 Poverty Law Rep. §18546 (D., Conn., 1973) where the states derived specific monetary benefits from the utility's activities.

²⁹States have been found to be joint participants for state action purposes in other utility termination cases. See Buffington F. Gas Service Co. - F.Supp. - (W.D., Mo., W.D., 1973) (City of Kansas shared "directly and proportionately" in the gross revenue of the defendant utility); Bronsor v. Consolidated Edison of New York, 350 F.Supp. at 446 (the "utility is licensed to and does act as an agent of the state"); Palmer v. Columbia Gas of Ohio, 479 F.2d at 165 ("the regulatory activities of the state have insinuated it into a position of interdependence with the company so that it must be recognized as a joint participant with the company"). Also see Ihrke v. Northern States Power Co., 459 F.2d at 569.

challenged conduct. Public Utilities Commission, Pollak, 343 U.S. 451 (1952).

The Court of Appeals held that Metropolities Edison's termination procedure is merely the product of internal corporate action without acquiescence of or authorization by the Commonwealth of Pennsylvania

However, Tariff Reg. No. VIII, is not the only state regulation to be considered here, for the Court has overlooked specific statutory authorization for the challenged practice. The Public Utility Code, 66 Pa Stat. Anno. §1171 states inter alia:

"Subject to the provisions of this act and the regulations or orders of the [Public Utility] Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service..." (emphasis added).

Together with filing requirements of Tariff Reg. No. VIII, this statute subjects utility regulations governing conditions of service and termination to the regulatory authority of the Public Utility Commission. It requires the utility to adopt regulations acceptable to and to be approved by the Commission. It mandates a statutory standard of reasonableness. It subjects the corporation's regulations to the enforcement and compliance authority of the Commission. 66 Pa. Stat. Anno. §§1341, 1342, 1343, 1347.

Pursuant to Section 1171, Metropolitan Edison has promulgated Electric Tariff No. 41 which provides

³⁰The only state involvement found by the court was Public Utility Commission regulation, Tariff Reg. No. VIII, which requires utility corporations to set forth the conditions of service termination for non-payment of accounts. This requirement, the court ruled, is not sufficient state involvement to satisfy the state action requirement. 483 F.2d at 758 (A-85).

unchecked authority to terminate utility service for alleged nonpay, ent of a bill. This tariff has been formally presented to the Public Utility Commission under its requirements governing submission of proposed tariffs. Tariff Reg. No. II. It has been accepted and approved by the Commission under its general regulatory authority. 66 Pa. Stat. Anno. §§1341, 1348. In the absence of Commission disapproval, the Public Utility Law provides that tariffs filed with the Commission will automatically become effective, upon notice, sixty days after filing. 66 Pa. Stat. Anno. §1348; Pa. P.U.C. Tariff Regulations, Section II, "Public Notice of Tariff Changes". In the instant case, Me politan Edison filed its termination tariff on April 30, 1971, and it became effective on June 30, 1971. Metropolitan Edison Company Electric Tariff, Electric Pa. P.U.C. No. 41, Rule 15.

significantly involves the Commonwealth with the challenged practices. The statutory provision goes far beyond the simple notice-filing requirement of Tariff Reg. No. VIII, cited by the Circuit Court. The Public Utility Commission is to define the standard of reasonableness; it is to review proposed regulations; it is to accept or reject those regulations. And having required, reviewed, accepted, and approved the challenged tariff, the Commission has vested Tariff No. 41 with the apparent authority of the Commonwealth and clothed the termination practice with the legitimacy of law. In short, the state has directly approved Metropolitan Edison's exercise of the tariff provisions. Public Utilities Commission v. Pollak, 343 U.S. at 462.

Moreover, Tariff No. 41 carries the force and effect of law. Cray v. Pa. Grayhound Lines, 177 Pa. Super. 275, 110 A.2d 892 (1955). Having been submitted,

received and approved by the Commission, the tariff is clothed with an authority which could not otherwise be enforced.³¹ Therefore, Metropolitan Edison's tariff is no less an index of specific authorization than was the termination statute in *Palmer v. Columbia Gas of Ohio.* 479 F.2d at 162.

The fact that the Commission may not have held formal hearings to approve or ratify the Respondent's tariff is not material in view of the fact that such tanff was submitted as required by law and was not disapproved,³² even though the Commission had the power to do so.³³ If Respondent's tariff did not carry

³¹ Significantly, although there was no statutory or regulator authorization in *Ihrke v. Northern States Power Co.*, 459 F.2d at 570, the court found specific municipal authorization for such activity by the fact that the city had a right to "review and revise" all of the company's proposed regulations.

³²The Commission's silence on the matter constitutes its consent. Hence, in Washington Gas Light Co. v. V. ginia Electric and Power Co., the court stated that:

[&]quot;The argument [lack of investigation or formal approval] is not without merit, but the conclusion is not inevitable unless one equates administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i.e., approval. Indeed the latter inference seems the more likely one when we remember that even the gas company concedes that the S.C.C. possessed adequate regulatory power to stop V.E.P.C.O. if it chose to do so . . ." 438 F.2d at 252.

Respondent's challenged activity, its failure to exercise such power is immaterial for a finding of state action. Pendrell s. Chatham College, 42 L.W. 2429 (W.D., Pa., 1974). Such reservation of the power to control operations was specifically noted by the court in Palmer, supra, 479 F.2d at 164, as an important index of state action. Significantly, although no statutory or regulatory authorization for termination existed in Ihrke v. Northern States Power Co., supra, 459 F.2d at 570, the court found specific municipal authorization of such activity in

e approval and authority of the Commission, it would we no force and effect and could not serve as stificiation for Metropolitan Edison's termination ractices.³⁴

2. The Commonwealth of Pennsylvania has specifically encouraged the Respondent's termination practices.

In Reitman v. Mulkey. 387 U.S. 369, 386 (1967), this Court concluded that prohibited state involvement could be found even where the state can be charged with only "encouraging", rather than "commanding" discrimination. Thus, where the offending party can begitimately rely on a state statute which authorizes or permits the challenged conduct, whether or not such conduct could, have been engaged in prior to enactment of the statute, a finding of action under color of law is justified. See Railway Employer Department v. Hanson, 351 U.S. 225 (1956); Mc' be v. Atchison Topeka & Santa Fe R. Co., 235 U.S. 151 (1914); Nixon v. Condon, 286 U.S. 73 (1932).

the fact that while the company had the right to prepare its own regulations, the City had the right to review and revise all of the company's regulations.

³⁴Since Respondent operates solely under the authority of the Public Utility Law, 66 Pa. Stat. Anno. §1171 et seq, any argument that utilities could lawfully terminate services arbitrarily at common law is irrelevant and must be rejected. Palmer v. Columbia Gas Co. of Ohio, 479 F.2d at 162. Also see Reitman v. Columbia Gas Co. of Ohio, 479 F.2d at 162. Also see Reitman v. Mulkey, 387 U.S. 369 (1967); New York Times v. S. van, 376 U.S. 245 (1964). Furthermore, any such historically state sanctioned activity would in itself be considered state action since it was undertaken pursuant to state "custom or usage" within the purview of 42 U.S.C. §1983. See Adickes v. S.H.Kress Co., 398 U.S. 144 (1970).

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In addition to Commission approval of Metropolitan Edison's termination practices, the Pennsylvania statutory and regulatory scheme also encourages such termination action. The Legislature has thus provided that there be prior Commission approval, including a finding of "compliance with existing laws", for a variety of utility actions, including abandonment of termination of services. 66 Pa. Stat. Anno. §1122 However, at the same time, the Legislature also specifically exempted termination for nonpayment of a bill from the requirement of obtaining prior Commission approval and finding of compliance with the law, needed for almost all other utility company activities Id, §1122(d).

In further encouragement of Respondent's termination practices, the Commission has promulgated several regulations regarding entry on private property and discontinuance of service. Thus, Pa. P.U.C. Electric Regulations, Rule 14D provides that utility personnel may have access to meters and equipment located in customers' premises. In addition, Pa. P.U.C. Tariff Regulations, Section VIII, provides that all public utilities that "impose penalties upon its customers for failure to pay bills promptly shall provide in its posted and filed tariffs a rule setting forth clearly the circumstances and conditions in which the penalties are imposed . . ." Accordingly, the Respondent filed its tariff regarding termination of service with the Commission, as Metropolitan Edison Company Electric Tariff, Electric Pa. P.U.C. No. 41, Rule 15, pursuant to which it terminated Petitioner's electrical service."

³⁵Courts have found state action where public utilities were directly encouraged or authorized by state statutory or regulatory schemes to terminate utility services for nonpayment of bills. See Bronson v. Consolidated Edison Co. of New York. Inc., supra; Buffington v. Gas Service Co., supra; Stanford v. Gas Service Co., supra.

the state has specifically "fostered and encourthe activity challenged herein.
addition to the specific authorization for and
ragement of Respondent's practice challenged
the Commonwealth has lent further affirmative
ret to Respondent's activity by assuring Respondmonopoly in the provision of such services,
by providing a further disincentive to Respondent
frain from terminating services for nonpayment of
puted bill.

The Commonwealth of Pennsylvania has delegated to Respondent the Public Utility Commission's statutory responsibility to assure that customers are not arbitrarily and unlawfully deprived of "reasonably continuous" electrical services.

The Commission has the duty to see to it that utility stomers receive reasonably continuous service, withtuneasonable interruptions or delay, 66 Pa. Stat. no. §§1171, 1182, 1183, 1341, as part of its imary obligation of protecting the rights and interests the public. However, both the Legislature and the formulation of Tariff VIII, and Section 1122, 66 Pa. tat. Anno. §1122, and have thereby transferred such esponsibility to the Respondent.

Not only has the Commission delegated its statutory esponsibility, but it has also specifically refused to promulgate additional rules and regulations regarding utility company collection and termination practices.³⁶

The petitions of several low income consumers (including that of the Petitioner) filed with the Commission, requesting statewide rule making hearings on the issue of whether opportunity for a prior hearing should be required prior to termination of services for nonpayment of a disputed bill, were recently dismissed by the Commission on March 20, 1974, at Complaint Docket No. C.20089.

By thus approving the Respondent's termination of service tariff, the Commission has authorized the Respondent to determine the reasonableness of its own termination actions. Such abdication of responsibility cannot conceivably be in furtherance of the Commission's duty to "protect the public". Citizens Water Co. of Washington, Pa. v. Pa. P.U.C., 181 Pa. Super 301, 124 A.2d 123 (1956).

It is submitted that the situation in the instant case is very similar to the situation in *Boman v. Birmingham Transit Co.*, supra. It was held by the Fifth Circuit therein that:

"Where, as here, the City delegated to its franchise holder power to make rules for seating of passengers and made the violation of such rules criminal... we conclude that the Bus Company to that extent became an agent for the State, and its actions in promulgating and enforcing the rule constitutes a denial of the Plaintiff's constitutional rights." Id, 280 F.2d at 535.³⁷

This Court has held that state "inaction" may be a significant indicia of state action. Hence, in *Burton v. Wilmington Parking Authority*, supra, this Court noted that:

"... the Authority could have affirmatively required Eagle to discharge the responsibilities under the

³⁷It is apparent that the sole distinction between the instant case and *Boman* is that the Respondent's termination rule is not enforceable by criminal sanctions. However, Petitioner submits that this is, in effect, a distinction without a difference, since the consequences of her failing to pay Respondent's bill resulted in a penalty to her that was at least as severe as that of a conviction for breach of the peace. Property rights are no less deserving of constitutional protections than are personal rights. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

ourteenth Amendment imposed upon the private interprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be ... By its inaction the Authority, and through it the state, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." 365 U.S. at 725.

Similarly, in failing to impose due process requireents on Metropolitan Edison's tariffs the state has fectively abdicated its responsibility in this area.³⁸ See mentes v. Shevin, 407 U.S. 67, 93 (1972) in this gard.

In conclusion, whether the above state action heories are applied separately or cumulatively to detropolitan Edison, they show a picture of state involvement that has a significant effect on a customer's relations with a public utility. Mrs. Jackson and her family were in no position to bargain with Metropolitan Edison for a delay or reconsideration in the termination decision; they could seek electricity from no one else in their area when their service was terminated. The utility's regulations, which have the effect of law, and which were approved by the Commission, provided her in theory with nothing more than some notice. When no such notice was provided to Petitioner, she had no redress. The state had specifically exempted from the

³⁸ In this regard, it may be noted that state action, based in part upon state "inaction" was found in other utility termination cases. For example, see *Bronson v. Consolidated Edison of New York, Inc.*, 350 F.Supp. at 447, where the court noted that the statute authorizing termination of service did not go "far statute authorizing termination of service did not go "far enough", since it failed to also provide for due process protections.

requirement of prior Commission approval, the termination of service for nonpayment of bills. Finally, the company was legally empowered to enter Mrs. Jackson's home to shut-off electricity at her meter. The end result is a denial of fundamental fairness to Mrs. Jackson and to other utility customers, and both Metropolitan Edison and the state must jointly bear a direct responsibility for this result.

DUE PROCESS OF LAW REQUIRES THAT BEFORE PETITIONER'S ESSENTIAL UTILITY SERVICES MAY BE TERMINATED, PETITIONER MUST BE PROVIDED WITH ADEQUATE PRIOR NOTICE AND OFPORTUNITY TO BE HEARD.

A. Due process of law is necessary in order to prevent the arbitrary and erroneous deprivation of a statutorily conferred entitlement or property right essential to life and health.

This Court has repeatedly reaffirmed the principle that, "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy the right they must first be notified." Baldwin v. Hale, 68 U.S. 223, 233 (1863), as cited in Fuentes v. Shevin, 407 U.S. 67, 80 (1972). Additionally, for those rights to be effective they "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). A deprivation of a property interest or entitlement requires that the opportunity to be heard and to contest the deprivation be provided before the loss of the property or benefit. Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970): Boddie v. Connecticut, 401 U.S. 371 (1971).

The Pennsylvania Public Utility Law, by mandating that "reasonably continuous" utility service be provided on a non-discriminatory basis, 66 Pa. Stat. Anno. \$\\$1171, 1144, confers by statute a benefit or entitlement to utility customers no less important, than other property interests or personal rights heretofore afforded due process protection by this Court. Fuentes v. Shevin, supra, (household goods); Bell v. Burson, supra (driver's license); Goldberg v. Kelly, supra (welfare benefits). See also Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

Electricity services, as with other utility services, have been described by this Court and lower courts as "necessities of life". 40 One lower federal court, in explaining the greater threat to life and health that arises from termination of heat or electricity as compared with the termination of welfare benefits considered in Goldberg v. Kelly, observed that "A person can freeze to death or die of pneumonia much more quickly than he can starve to death." This

³⁹The great majority of lower courts considering the issue have held that utility customers possess a constitutionally protected interest not to have their utility service arbitrarily terminated. See, e.g., Palmer v. Columbia Gas Co., 342 F.Supp. 241, 244 (N.D., Ohio, 1972) aff'd, 479 F.2d 153 (6th Cir., 1973); Bronson v. Consolidated Edison Co., 350 F.Supp. at 447; Stanford v. Gas Service Co. 346 F.Supp. 717, 719-21 (D.Kan. 1972); Lamb v. Hamblin, Util. L.Rep. (State) §21, 850 (D., Minn., Nov. 30, 1972); Davis v. Weir, 328 F.Supp. 317, 321-22 (N.D., Ga., 1971); cf. Lucas v. Wisconsin Electric Power Co., 438 F.2d 248, 646 n. 13 (7th Cir., 1972) cert. den. 409 U.S. 1114 (1973).

⁴⁶Moose Lodge 107 v. Irvis, 407 U.S. 163, 173 (1972); Jones City of Portland, 245 U.S. 217, 223 (1917); Stanford v. Gas Service Co., supra, 346 F.Supp. at 720; Davis v. Weir, supra, 328 F.Supp. at 321; Bronson v. Consolidated Edison Co. of New York, Inc., 350 F.Supp. at 447. Also see infra, pp. 16-17.

⁴¹ Palmer v. Columbia Gas Co. of Ohio, 342 F.Supp. 241, 244 (N.D., Ohio, 1972), aff'd. 479 F.2d 153.

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observation became a tragic reality this year when the media reported the deaths of utility customers who services were summarily terminated. Such utility terminations most often cause their greatest hardship on the poor and elderly. See Palmer v. Columbia Gas of Ohio, supra, 479 F.2d at 169; Shelton, "The Shutoff of Utility Services for Non-payment: A Plight of the Poor," 46 Washington L.Rev. 745 (1971); Note, "Public Utilities and the Poor", 78 Yale L.J. 448 (1969).

Certainly the facts in this case show the suffering experienced by a low income mother living alone with two minor children all of whom had to live in their home for eight days and nights without lighting adequate heat, or hot water for cooking or hygienic purposes. The temporary judicial relief obtained may well have prevented the colds experienced by the two-children in this period from becoming more serious threats to their health.

The current situation involving unfettered termination power leads to erroneous terminations and constitutes an additional reason to apply due process protections in utility termination situations. Thus, one federal court was moved to comment on the "Orwellian nightmare of computer control which breaks down

⁴² "Elderly Couple Found Frozen in Syracuse Home", The New York Times, Dec. 26, 1973 (electricity termination making gas furnace inoperative); "Man, Seventy-one, Freezes to Death After Utility Shuts Off Gas", Boston Globe, p. 17 (Feb. 9, 1974); "Tragedies: A Winter's Tale", Newsweek, p. 28 (Jan. 8, 1974).

⁴³See also Amicus Brief of the National Consumer Law Center.

⁴⁴The casual observation of the Court of Appeals that there is no "threat" to life from utility termination is thus contradicted by real events. (A-88).

hugh mechanical and programmers' failures and

The monopoly nature of the utility service further is little incentive to qualify the unrestricted use of termination power in order to be competitive or to termination power in order to be competitive or to ain good will from such customers. See Note, 86 are L.Rev. at 1477 Abuse of the termination power common with utility employees evoking a "shocking-callous and impersonal attitude" toward customers. In irresponsible conduct of the Metropolitan Edison are irresponsible conduct of the Metropolitan Edison apparentative in this case is apparent when he indicated in this case is apparent when he indicated and would be accepted four days later, and, acquired and would be accepted four days later, and, actionally representatives to come and cut-off the electricity on that day.

Arbitrariness and unfairness further results from questionable billing practices and erroneous terminations despite full payment of the bill. See Note, 48 N.Y.U. L.Rev. supra at 515. Further, the unequal bargaining position of the consumer, particularly the low income consumer, makes it unlikely for him or her either to be familiar with or able to afford litigation remedies for a utility dispute.⁴⁷ cf., Fuentes v. Shevin,

⁴⁵ Bronson v. Consolidated Edison Co. of New York, supra, 350 F.Supp. at 444.

^{*}Palmer v. Columbia Gas of Ohio, supra, 342 F.Supp. at 243, aff'd 479 F.2d 153. An employee's response to a customer who daimed he paid a bill was "Tough. Pay the bill again." 479 F.2d at 158. Another advised a cut-off victim, "Run around to keep water." Id. at 168.

Warm." Id. at 168.

47 Palmer v. Columbia Gas of Ohio, 479 F.2d at 748-52. Other functions on tort remedies include the delay and burdentomeness to a customer who would pay an unjust bill to avoid tomeness to a customer who would pay an unjust bill to avoid loss of service and expenses of litigation. See Note, 86 Harv. L.Rev. at 1477, n. 26.

407 U.S. at 83 n. 13 (1972). Finally, customers of an have valid defenses and bases for contesting bills for the above and other reasons. 48 Mrs. Jackson here: questioned, to no avail, whether she was legally little for the utility services for which she claimed Dodge had contracted.

It is apparent that "unjust terminations exact a har personal and societal cost, as measured in demoralization and frustration, and are offensive to our society's basic notions of fairness." It was this kind of frustration caused by a "lack of accessible and visited means of establishing the merits of grievances" that was highlighted as a key factor in the civil disorders of the 1960's. 50

It is submitted that this Court's rationale for applying due process protection in Goldberg v. Kell; is certainly as applicable to the case of utility terminations. Thus:

"[T]he stakes are simply too high ... and the possibility for honest error or irritable misjudg-

⁴⁸ Recognized customer claims and defenses which could be raised at prior hearings if the opportunity were provided include overcharging mistakes and failure to record full payment of outstanding bills, Bronson, 350 F.Supp. at 445, supra, 345 F.Supp. at 243; inaccurate or inoperative meter, Crews to Jacksonville Elec. Authority, Pov. L.Rep. §13,647 (Fla. Cir. Ct. 1971); inadequacy of service due to faulty utility equipment. York Tel. and Tel. Co. v. Pa. P.U.C., 181 Pa. Super. 11, 121 A.2d 605 (1956); customer's refusal to pay debt of prior owner or tenant, Tyrone Gas and Water Co. v. P.S.C., 77 Pa. Super. 292 (1921); denial of service to wife upon husband's refusal to pay his bill, Southwestern Bell Tel. Co. v. Batesmar, 266 S.W.2d 289 (Ark. 1954) See also Shelton, 46 Wash. L.Rev. at 763-64.

⁴⁹Note, supra, 86 Harv. L.Rev. at 1482.

⁵⁰ See Report of the Nat'l Advisory Comm'n on Civil Disorders, 291 (1968). See also Amicus Brief of National Consumer Law Center, page 9, quote from "Mark Twain's Notebook."

too great, to allow termination ... without the recipient a chance ... to be fully aformed of the case against him so that he may contest its basis and produce evidence in rebuttal."

397 U.S. 254 at 266 (1970).

B. Due process for utility termination situations requires adequate prior notice of the nature and means of resolution of the dispute, and an opportunity for an oral hearing, prior to the termination of essential utility services.

While "due process is perhaps the least frozen concept of our law", Griffin v. Illinois, 378 U.S. 1 (1958) (Frankfurter J. concurring), it is apparent that when "protected interests" are at stake, the right to some kind of prior hearing is required. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972).

In this case, the Petitioner had a statutory entitlement to the continued receipt of electrical services to the extent that such services could not be terminated in the absence of due process of law. 66 Pa. Stat. Anno. §1171. In this regard, it has been held by this Court that property interests requiring constitutional protection "extend well beyond the actual ownership of real estate, chattels or money", Roth, supra at 572. They extend as well to "safeguard . . . the security of interests that a person has acquired in specific benefits." Id. See also California Department of Human Resources v. Java, 402 U.S. 121 (1971); Goldberg v. Kelly, supra. Thus, to have a property interest in a benefit, a person must have a legitimate claim of entitlement to it. Since protection must be afforded to "those claims upon which people rely in their daily lives," such reliance must not be "arbitrarily undermined." Roth, supra at 576-577. It cannot be doubted in this case that Mrs. Jackson and her children were arbitrarily deprived of an entitlement upon which they relied as a necessity of life.

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Due process requires minimally that prior notice be provided that is "reasonably calculated, under at circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," Grannis v. Ordean, 234 U.S. 385 (1914); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950); Fuentes : Shevin, 407 U.S. 67, 80 (1972), at a hearing at a meaningful time and in a meaningful manner, Armstrong v. Manzo, 380 U.S. 545 (1965); Boddie r. Connecticut, 401 U.S. 371 (1971). Such hearing must take place before the utility customer is condemned to suffer a "grievous loss". Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concuring). No state interest is present herein which warrants a deprivation prior to the hearing. Fuentes v. Shevin, 407 U.S. 67 (1972). The grievous loss to the customer outweighs any competing state interest, as Mrs. Jackson and her children can readily affirm.

A utility customer must be given a notice sufficiently in advance to permit adequate opportunity to prepare for and be present at the hearing. Mullane v. Central Hanover Bank and Trust Co., supra. The notice must provide the customer with the information he needs to quickly and intelligently take available steps to prevent the threatened termination of service. Palmer, 479 F.2d at 166; Bronson, 350 F.Supp. at 450. Thus, the customer should be advised of the possibility of resolution of the dispute by contacting a particular company representative. Palmer, supra at 166. Further-

the notice should advise of the right to either a to the state regulatory commission or to have a novo formal or informal hearing before the actory commission. Bronson, supra at 449. Of se, the customer must be advised of the right to inued utility service in the event that the dispute aution procedure is invoked. Palmer, supra, 166. We the reasonableness of any notice procedure must considered in the light of the circumstances of each circular case, Covey v. Town of Somers, 351 U.S.

(1956), it is submitted that the above notice uirements are the very rudiments of a fair warning needure. 51

There is currently insufficient or no notice to the numer before termination despite requirements of me notice. Notwithstanding Metropolitan Edison's me notice. Notwithstanding Metropolitan Edison's riff approved by the Commission, providing for easonable notice", no notice whatsoever was provided of Mrs. Jackson prior to or on the Monday she was expecting a company representative to receive a \$30.00 ayment; she made fruitless phone calls to company approves, even to the home of one of the employees, o protest and seek some redress. This case is illustrative of a pattern which has emerged from other federal attility termination cases. ⁵² In addition, this case and

⁵¹ This Court has stressed the fact that particularly the uneducated, uninformed consumer cannot be presumed to know his legal rights or how to seek redress for them. Fuentes v. Shevin, 407 U.S. at 83 n.13.

warning... [W] hen the collectors went out to shut-off gas, they frequently did so without any announcement whatever to the consumer, even though the consumer was sitting right in his house, so that the first notice he would have of the shut-off was that his house got cold, or his kitchen range would not light..." 342 F.Supp. at 243. Ohio law requires 24 hours' notice before workmen could enter the home and disconnect the meter. Id. at workmen could enter the home and disconnect the meter. Id. at 245. In Davis v. Weir, absolutely no notice was provided the consumer-tenant before water service was shut-off. 328 F.Supp. at 320.

others attest to the inadequacy of notice when and if it does come. Although Mrs. Jackson was told that money was owing she was never even presented with any bills or explanation why she, rather than Dodson, should pay the entire sum allegedly owing.⁵³ Nor was she warned that her electricity would be discontinued for failure to pay the bill.

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Due process also requires an opportunity to be heard in a manner appropriate to the nature of the case. The hearing must naturally take place before an impartial third party. Morrissey v. Brewer, 408 U.S. 471 (1972). Goldberg v. Kelly, 397 U.S. at 267-71. The burden of proof should be placed on the utility company to prove that the bill is due. Wood v. City of Auburn, 87 Me. at 293. In addition, the utility customer must be permitted to examine the company's records in advance, cross examine adverse witnesses and present his or her own case, with the assistance of a representative, if necessary. Goldberg v. Kelly, supra, at 267-271.

The experience with utilities has shown that their shut-off and complaint procedures are grossly inadequate with "unresponsiveness or 'runarounds' the only answer to [the customer's] inquiries." *Bronson*, supra, 350 F. Supp. at 448.⁵⁴ No hearings are provided and

⁵³In *Bronson* the consumer merely received a 3" x 8" slip of paper with a bare one sentence "we are sorry" notice that the court found constitutionally inadequate. 350 F.Supp. at 450. See also *Palmer*, supra, 342 F.Supp. at 242-44.

⁵⁴See also, e.g. Palmer v. Columbia Gas Co., 342 F.Supp. at 243-44; Note, supra, 48 N.Y.U. L.Rev. supra, at 517.

course to regulatory commissions for hearings have en gen ally fruitless. In a front ion, the alternative of any fire and litigate later" as satisfied by the Court Appeals at (A-91) is sirply a "non-alternative" Appeals at (A-91) is sirply a "non-alternative" onson v. Consolidated Edison Co. of New York, 350 Supp. at 449, for poor persons. Recourse to other ormal or informal remedies are equally inadequate. The state of the court is a formal adjudicatory

It should be noted that a formal adjudicatory earing, which the state regulatory agency could chedule and conduct, need not be the first or sole method of dispute resolution. Utilities may wish to establish complaint bureaus, under state regulation, refore formal hearings are scheduled. These proceedings will undoubtedly lead to the roompt and low-cost resolution of most termination aputes, leaving the more protracted or complex disputes for the formal adjudicatory hearing. The experience in New York State, where the dual conference-type hearing and

The Petitioner herself filed a complaint with the Pa. Public Utility Commission to seek rulemaking hearings to establish rules for hearings prior to termination of service but the complaint, deemed a petition, was summarily dismissed. See footnote No. 36 supra.

see Shelton, "The Shutoff of Utility Services for Nonpayment: A Plight of the Poor." 46 Wash. L.Rev. 745, 748-52 (1971). The Third Circuit's reference below to small claims courts 438 F.2d at 760 n. 11. entirely ignores the fact that these bodies have no equity powers and cannot restore terminated service, and further, that consumers are never given notice and do not otherwise know that these bodies exist to deal post-facto with billing disputes. See also Fuentes v. Shevin, 407 U.S. 67, 83, n. 13 (1972).

⁵⁷See contra, Lucas v. Wisconsin Electric Power Co., 466 F.2d at 649, where the court held that adequate administrative remedies in fact existed in that case.

formal evidentiary-type hearing system utilizing imputial Public Service Commission officers has been in use for some time, concretely demonstrates the workability and effectiveness of the due process procedure suggested above. 58

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The decision below relies heavily on the view that utility service is not so important as to warrant due process protection. This is refuted by this Court's decisions above protecting similar interests or property entitlements. Board of Regents v. Roth, 408 U.S. 564 (1972). This Court has further rejected as constitutionally deficient, the procedures allowing for the taking of property pending a final judgment and those allowing for posting of a bond or security to regain property. Fuentes v. Shevin, 407 U.S. at 72-73.

The Court below also accepted the premise that utility service could be arbitrarily or wrongfully terminated and the wrong remedied by full payment of the disputed bill followed by a claim for a refund, is court if necessary. 483 F.2d at 760-61. (A-89). Even assuming the validity of the assumption that claiming and suing for a refund are available remedies, that premise ignores the recent holding of this Court that:

"[N] o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 U.S. 645, 647...'

⁵⁸ See Amicus Brief of the Public Service Comm'n of the State of New York; see also Note, supra, 86 Harv. L.Rev. at 1503.

CONCLUSION

or the foregoing reasons, Petitioner respectfully ests that this Court reverse the Judgment and Order the Third Circuit Court of Appeals, and hold that condent did act under color of law in terminating tioner's electrical services without the adequate or notice and opportunity to be heard required by process of law. Petitioner requests that this case be nanded to the district court for a determination and ther proceedings in accordance with the opinion term.

Respectfully submitted:

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April 26, 1974

APPENDIX A

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STATUTES, REGULATIONS AND TARIFFS

A. Pennsylvania Public Utility Code

Pennsylvania Statutes Annotated, Title 66, Sections:

- a. \$452. Commission established; terms of office; qualifications of members; chairman; compensation; quorum
- (a) A commission to be known as the Pennsylvania Public Utility Commission is hereby created. The commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. The commissioners first appointed under this act, shall continue in office for terms of two, four, six, eight and ten years, respectively, from the effective date of this act, but their successors shall each be appointed for a term of ten years. No commissioner, upon the expiration of his term as aforesaid, shall continue to hold office until his successor shall be duly appointed or shall be qualified. Each commissioner, at the time of his appointment and qualification, shall be a resident of the Commonwealth of Pennsylvania, and shall have been a qualified elector therein for a period of at least one year next preceeding his appointment, and shall also be not less than thirty years of age.
- (b) A member designated by the Governor shall be the chairman of the commission during such member's term of office. When present, the chairman shall preside at all meetings, but in his absence a member, designated by the chairman, shall preside and shall exercise, for the time being, all the powers of the chairman.

(c) Each of the commissioners shall receive an annual salary of nineteen thousand dollars (\$19,000.00), except the chairman, who shall receive an annual salary of twenty thousand dollars (\$20,000.00).

(d) Three members of the commission shall constitute a quorum who, for all purposes, including the making of any order or the ratification of any act done or order made by one or more of the commissioners, must act unanimously. 1937, March 31, P.L. 160, \$1; 1943, March 31, P.L. 32, \$1. 1949, March 31, P.L. 369, No. 32, \$1, 1957, July 16, P.L. 949, No. 408, \$1.

b. §461. Powers and duties of commission.

The Pennsylvania Public Utility Commission shall exercise the powers and perform the duties exercised and performed prior to the effective date of this act by the Public Service Commission of the Commonwealth of Pennsylvania, and any powers and duties subsequently vested in and imposed upon the Pennsylvania Public Utility Commission by law. 1937, March 31, P.L. 160, \$10.

c. §462. Additional powers and duties

The Pennsylvania Public Utility Commission shall have the power and its duties shall be - $\,$

(a) To administer and enforce the act, approved the twenty-eighth day of May, one thousand nine hundred thirty-seven (Pamphlet Laws, one thousand fifty-three), designated as the "Public Utility Law", as amended and supplemented, or any law hereafter enacted for the regulation of public utilities.

to certify to the Department of Health any question of fact regarding y of water supplied to the public by any public service company or ility over which it has jurisdiction, when any such question arises entroversy or other proceeding before it, and upon the determination question by the Department of Health, to incorporate the findings of d thereon in its decision upon the controversy or other proceeding hich the question erose. 1937, March 31, P.L. 160, \$11; 1941, July 8, 4, \$1.

Short title

sact shall be known, and may be cited, as the "Public Utility Law". ay 28, P.L. 1053, art. 1, \$1.

Organization of public utilities and beginning of service.

on the approval of the commission, evidenced by its certificate of convenience first had and obtained, and not otherwise, it shall be

for any proposed public utility.

To be incorporated, organized, or created: Provided, That existing elative to the incorporation, organization, and creation of such public s shall first have been complied with, prior to the application to the ssion for its certificate of public convenience.

) To begin to offer, render, furnish, or supply service within this Drwealth, 1937, May 28, P.L. 1053, art. II, \$201. (emphasis added)

122. Enumeration of facts requiring certificate

pon approval of the commission, evidenced by its certificate of public connce first had and obtained, and upon compliance with existing laws, and

 For a foreign public utility to obtain the right to do business within this conwealth, if existing laws permit such foreign public utility to exercise its

ers and franchises within this Commonwealth. (b) For any public utility to renew its charter, or obtain any additional right, er, franchise, or privilege, by any amendment or supplement to its charter,

(c) For any public utility to begin the exercise of any additional right, power,

(d) For any public utility to dissolve, or to abandon or surrender, in whole in part, any service, right, power, franchise, or privilege: Provided. at the provisions of this paragraph shall not apply to discontinuance of service patron for nonpayment of a bill, or upon request of a patron. (emphasis added).

(e) For any public utility, except a common carrier by railroad subject Interstate Commerce Act, to acquire from, or to transfer to, any person or peration, including a municipal corporation, by any method or device whatsoer, including a consolidation, merger, sale or lease, the title to, or the session or use of, any tangible or intangible property used or useful in the

olic service: Provided, however, That such approval shall not be required if the undepreciated book value of the property to be acquired or transferred not exceed one thousand dollars; or (2) if the undepreciated book value of the everty to be acquired or transferred does not exceed the lesser of - (a) two

er centum of the undepreciated book value of all of the fixed assets of public utility, or (b) five thousand dollars in the case of personality or fifty thousand dollars in the case of realty; or (3) if the property to be and any is to be installed new as a part of or consumed in the operation of the u et to ful property of such public utility; or (4) if the property to be transferred by public utility is obsolete, worn out or otherwise unserviceable.

But exceptions (1), (2), (3), and (4) shall not be applicable, and approximate the commission evidenced by a certificate of public convenience shall be report if any such acquisition or transfer of property involves a transfer of patrice

(f) For any public utility to acquire five per centum or more of the verge

capital stock of any corporation

(g) For any municipal corporation to acquire, construct, or begin to There any plant, equipment, or other facilities for the rendering or furnishing to ne public of any public utility service beyond its corporate limits. 1937, May 28, P.L. 1053, art. II, \$202; 1938, S. Sess., Sept. 28, P.L. 44, \$1; 1939. 19, P.L. 419, \$1.

g. \$1123 Procedure to obtain certificates of public convenience

(a) Every application for a certificate of public convenience shall be to the commission, in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if and when the commission shall find or determine that the granting of such certificate is necessary or proper for the service accomodation, convenience, or safety of the public; and the commission in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

(b) For the purpose of enabling the commission to make such finding of determination, it shall hold such hearings, which shall be public, and, before or after hearing, it may make such inquiries, physical examinations, valuations, and investigations, and may require such plans, specifications, and estimates of cost, as it may deem necessary or proper in enabling it to reach a finding or determination. 1937, May 28, P.L. 1053, art. II, \$203. (emphase

added).

h. \$1124. Certain appropriations by the right of eminent domain prohibited

Neither a proposed domestic public utility hereafter incorporated nor a foreign public utility hereafter authorized to do business in this Commonweal's shall exercise any power of eminent domain within this Commonwealth until # shall have received the certificate of public convenience required by section. of this act. 1837, May 28, P.L. 1053, art. II, \$204, added, 1963, Aug. 28, P.L. 1225, §3.

§1141. Rates to be just and reasonable.

Every rate made, demanded, or received by any public utility, or by any :** or more public utilities jointly, shall be just and reasonable, and in conforming with regulations or orders of the commission; Provided, That only public utility service being furnished or rendered by a municipal corporation, or by the operation agencies of any municipal corporation, beyond its corporate limits, shall be see to regulation and control by the commission as to rates, with the same force.

synner, as if such service were rendered by a public utility. 1937, May 28, P.L. 13. art. III, \$301; 1939, March 21, P.L. 10, No. 11, \$2.

; fil42. Tariffs; filing and inspection

Under Sucas regulations as the commission may prescribe, every public shall file with the commission, within such time and in such form as the extrasion may designate, tariffs showing all rates established by it and collected staforced, or to be collected or enforced, within the jurisdiction of the commission. tariffs of any public utility also subject to the jurisdiction of a Federal relatory body shall correspond, so far as practicable, to the form of those prescribed which Federal regulatory body. Every public utility shall keep copies of such wifs open to public inspection under such rules and regulations as the commission par prescribe. 1937, May 28, P.L. 1053, art. III, \$302.

1 11144. Discrimination in rates

No public utility shall, as to rates, make or grant any unreasonable preference # idvantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice r disadvantage. No public utility shall establish or maintain any unreasonable Afference as to rates, either as between localities or as between classes of wrvice. Unless specially authorized by the commission, no public utility shall Tike, demand, or receive any greater rate in the aggregate for the transportation a passengers or property of the same class, or for the transmission of any message or coversation for a shorter than for a longer distance over the same line or route the same direction, the shorter being included within the longer distance, or any greater rate as a through rate than the aggregate of the intermediate rates. Sething herein contained shall be deemed to prohibit the establishment of reasonable time or group systems, or classifications of rates or, in the case of common carriers, the issuance of excursion, commutation, or other special tickets, at special rates, or the granting of nontransferable free passes, or passes at a discount to any officer. employee, or pensioner of such common carrier. No rate charged by a municipality for my public utility service rendered or furnished beyond its corporate limits shall be considered unjustly discriminatory solely by reason of the fact that a different fate is charged for a similar service within its corporate limits. 1937, May 28, 7.L. 1053, art. III, \$304.

1. \$1148. Voluntary changes in rates

(a) Unless the commission otherwise orders, no public utility shall make tny change in any existing and duly established rate, except after sixty days' notice to the commission, which notice shall plainly state the changes proposed to te made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. All proposed changes shall be shown by filing new tariffs, or supplements to existing tariffs filed and in force at the time. The commission, for good cause shown, may allow changes in rates, without requiring the sixty days' notice, under such conditions as it may prescribe.

(b) Whenever there is filed with the commission by any public utility any tariff stating a new rate, the commission may, either upon complaint or upon its own motion, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, and pending such hearing and the decision thereon, the commission,

upon filing with such tariff and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before it become effective, suspend the operation of such rate for a period not longer than six months from the time such rate would otherwise become effective, and an address period of not more than three months pending such decision. The rate in force when the tariff stating the new rate was filed shall continue in force during the period of suspension, unless the commission shall establish a temporary rate of authorized in section three hundred ten of this act. The commission shall on sider the effect of such suspension in finally determining and prescribing the rates to be thereafter charged and collected by such public utility.

(c) If, after such hearing, the commission finds any such rate to be unjust or unreasonable, or in anywise in violation of law, the commission shall determine the just and reasonable rate to be charged or applied by the public utility for the service in question, and shall fix the same by order to be served upon the public utility; and such rate shall thereafter be observed until changed as provided by this act. 1937, May 28 P.L. 1053, art. III, \$308.

m. \$1149. Rates fixed on complaint.

Whenever the commission, after reasonable notice and hearing, upon its one motion or upon complaint, finds that the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law, the commission shall determine the just and reasonable rates (including maximum or minimum rates) to be the reafter observed and in force and shall fix the same by order to be served upon the public utility, and such rates shall constitute the legal rates of the public utility until changed as previded in this act. Whenever a public utility does not itself produce or generate that which it distributes, transmits, or furnishes to the public for compensative but obtains the same from another source, the commission shall have the power and authority to investigate the cost of such production or generation in any investigation of the reasonableness of the rates of such public utility. 1937.

May 28, P.L. 1053, art. III, \$309.

n. §1171. Character of service and facilities.

Every public utility shall furnish and maintain adequate, efficient, safe, 2018 reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accomodation, convenients and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations orders of the commission, every public utility may have reasonable rules and restions governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporative beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions with the same force and in like manner as if such service were rendered by a public utility. 1937, May 28, P.L. 1011 art. IV, \$401.

0. \$1172. Discrimination in service

No public utility shall, as to service, make or grant any unreasonable prefer

any person, corporation, or municipal corporation, or municipal corporation, or municipal corporation, or municipal corporation to any unreasonable classifications of service as to service, either as between localities or as between localities or as between service, but nothing herein contained shall be deemed to prohibit the manner of reasonable classifications of service. 1937, May 28, P.L. 1053, Fi. 1402.

1292. Standards of service and facilities

The commission may, after reasonable notice and hearing, upon its own motion from complaint, prescribe as to service and facilities, including the crossing facilities, just and reasonable standards, classifications, regulations and standards to be furnished, imposed, observed, and followed by any or all public standards for the measurement of cattly, quality, pressure, initial voltage, or other condition pertaining and supply of the service of any and all public utilities; prescribe reasonable relations for the examination and testing of such service, and for the measurement stands to secure the accuracy of all meters and appliances for measurement; and smile for the examination and testing of any and all appliances used for the measurement of any service of any public utility. 1937, May 28, P.L. 1053, arts. IV, 5412; 1937 5458., Sept. 28, P.L. 44, \$1.

1 1283. Regulation of Service

Whenever the commission, after reasonable notice and hearing, upon its own some or upon complaint, finds that the service or facilities of any public say are unreasonable, unsafe, inadequate, insufficient or unreasonably dissinatory, or otherwise in violation of this act, the commission shall determed and prescribe, by regulation or order, the reasonable, safe, adequate, safe, intent, service or facilities to be observed, furnished, enforced, or employed adding all such repairs, changes, alterations, extensions, substitutions, or provements in facilities as shall be reasonably necessary and proper for the saft, accommodation, and convenience of the public, and shall fix the same by the order or regulation. 1337, May 28, P.L. 1053, art. IV, \$413.

1 1211. Mandatory systems of accounts

The commission may, after reasonable notice and hearing, establish systems frounts (including cost finding procedures) to be kept by public utilities.

* may classify public utilities and establish a system of accounts for each in the public utilities and establish a system of accounts shall be kept.

* may public utility shall establish such systems of accounting, and shall keep the accounts in the manner and form required by the commission. The accounting system of any public utility also subject to the jurisdiction of a Federal system of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond, as far as practicable, to the system prescribed by such Federal regulatory body: Provided, That the commission may refer any such public utility to keep and maintain supplemental or additional from the system prescribed by such public utility to keep and maintain supplemental or additional from the system prescribed by any such regulatory body. 1937, May 28, P.L.

s. \$1217. Inspection of books and records by commission.

The commission shall at all times have access to, and may designate and its employees to inspect and examine, any and all accounts, records, books maps, inventories, appraisals, valuations, or other reports, documents, and memoranda kept by public utilities, or prepared or kept for them by others and the commission may require any public utility to file with the commission opies of any or all of such accounts, records, books, maps, inventories, appraisals, valuations, or other reports, documents and memorands. [327]
May 28, P.L. 1053, art. V, \$507.

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t. \$1241. Registration of securities to be issued or assumed.

(a) Under such regulations as the commission may prescribe, every utility, before it shall execute, cause to be authenticated, deliver, or atte any change or extension in any term, condition, or date of, any stock ont. cate or other evidence of equitable interest in itself, or any bond, note, true certificate, or other evidence of indebtedness of itself, any or all of which are are hereinafter included in the term "issuance of securities", shall have filed with the commission, and shall have received from the commission, by of registration of a document to be known as a securities certificate: Product That neither (1) the execution, authentication, or delivery of securities to replace identical securities lost, mutilated, or destroyed while in the on the contract. of a bona fide holder-for-value, who properly indemnifies the public utility therefor, nor (2) the execution, authentication, or delivery of securities a exchange for the surrender of identical securities, solely for the purpose of registering or facilitating changes in the ownership thereof between bona fide holders-for-value, which surrendered securities are thereupor. cancelled, nor (3) the delivery from the treasury of the public utility of securities previously reacquired from bona fide holders-for-value and ball alive, shall be deemed an issuance of securities under this subsection And provided further. That the requirements of this paragraph shall not apply to the issuance of - (1) any evidence of indebtedness, the date of make ? or which is at a period of less than one year from the date of its execution any evidence of indebtedness for which no date of maturity is fixed, but whole matures upon demand of the holder, (3) any evidence of indebtedness in the nature of a contract between a public utility and a vendor of equipment *** public utility promises to pay installments upon the purchase price of equation acquired, and which is not in the form of an equipment trust certificate or similar instrument readily marketable to the general public.

(b) Under such regulations as the commission may prescribe, every; and utility, before it shall assume primary or contingent liability for the payment of any dividends upon any stocks, or of any principal or interest of any indexenses, created or incurred by any other person or corporation, any or all of which acts are hereinafter included in the term "assumption of securities", shall have filed with the commission, and shall have received from the constant notice of registration of a document to be known as a Securities Certificate Provided, however, That the requirements of this paragraph shall not apply an assumption of securities if the commission shall have approved the account of all of the property of the issuing company by the assuming company, 14 for yield in paragraph (e) of section two hundred two of this act. 1937, May 14. P.L. 1053, art. VI, \$601; 1938, Sp. Sess., Sept. 28, P.L. 44, \$1.

u. §1271. Contracts for services.

(a) Within thirty days after the effective date of this act, every public utility having in force any contract with an affiliated interest for the furnished

ublic utility of any management, supervisory, purchasing, construcineering, financing, or other services, shall file a copy of such conif oral, a complete statement of the terms and conditions thereof, with

Every public utility which shall hereafter enter into any such conwhich shall change any such existing contract, shall file a copy of tract with the commission within ten days after its execution or charge. The commission shall have authority at any time to investigate every such filed in accordance with this section, and, if after reasonable notice and it shall determine that the amounts paid or payable thereunder are in of the reasonable cost of furnishing the services provided for in the t, or that such services are not reasonably necessary and proper, it shall uch amounts, in so far as found excessive, to be stricken from the books ent of the public utility as charges to fixed capital, or operating es, as the case may be, and shall not consider such amounts in any pro-. In any proceeding involving such amounts, the burden of proof to at such amounts are not in excess of the reasonable cost of furnishing evice, and that such services are reasonable and proper, shall be on blic utility. 1937, May 28, P.L. 1053, art. VII, \$701.

116. Contracts in violation of act void

very contract with an affiliated interest, made effective or modified in on of any provision of this act, or of any regulation or order of the ission made under this act, shall be void; and any purchase, sale, paylesse, loan or exchange of any service, property, money, security, , or thing under such contract, or under any contract with an affiliated interest, erms of which shall have been breached by the affiliated interest, shall be wful. 1937, May 28, P.L. 1053, art. VII, \$706.

EIII. Administrative authority of commission; regulations

The commission shall have general administrative power and authority pervise and regulate all public utilities doing business within this conwealth. The commission may make such regulations, not inconsistant the law, as may be necessary or proper in the exercise of its powers or the performance of its duties under this act. 1937, May 28, P.L. 1053, 13, \$901.

11342. Commission to enforce act

in addition to any powers hereinbefore expressly enumerated in this act. commission shall have full power and authority, and it shall be its duty, starce, execute, and carry out, by its regulations, orders, or otherwise, and singular the provisions of this act, and the full intent thereof; and shall te the power to rescind or modify any such regulations or orders. The express ceration of the powers of the commission in this act shall not exclude 7 power which the commission would otherwise have under any of the wisions of this act. 1937, May 28, P.L. 1053, art. IX, \$902.

11343. Enforcement proceedings by commission

whenever the commission shall be of opinion that any person or corporation netiding a municipal corporation, is violating, or is about to violate, any

(3)

provisions of this act; or has done, or is about to do, any act, matter, thing herein prohibited or declared to be unlawful; or has failed, omittee. neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this act; or has failed, omitted, neglected or act, or is about to fail, omit, neglect, or refuse to obey any lawful requirement gulation, or order made by the commission; or any final judgment, order. # decree made by any court, then and in every case the commission may institute in the court of common pleas of Dauphin County, injunction, managed other appropriate legal proceedings, to restrain such violations of the ; no visions of this act, or of the regulations, or orders of the commission. enforce obedience thereto; and such court of common pleas is hereby clause with exclusive jurisdiction throughout the Commonwealth to hear and determan all such actions. No injunction bond shall be required to be filed by the commission. Such persons, corporations, or municipal corporations as the court may deem necessary or proper to be joined as parties, in order to make a judgment, order or writ effective, may be joined as parties. The fina! judgment in any such action or proceeding shall either dismiss the action w proceeding, or direct that the writ of mandamus or injunction issue or to page permanent as prayed for in the petition, or in such modified or other form to ... afford appropriate relief. 1937, May 28, P.L. 1053, art. IX, \$903, as america, 1971 June 3, P.L. -, No. 6, \$1 (\$509(a)(115)).

z. \$1345. Reports by public utilities

The commission may require any public utility to file periodical reports at such times and in such form, and of such content, as the commission may prescribe, and special reports concerning any matter whatsoever about when the commission is authorized to inquire, or to keep itself informed, or which it is required to enforce. The commission may require any public utility to file with it a copy of any report filed by such public utility with any Federal department or regulatory body. All reports shall be under oath or affirmation when required by the commission. 1937, May 28, P.L. 1053, art. IX. 1935.

aa. \$1347. Adherence to regulations and orders of commission and courts

Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this act, affected by or size any regulations or orders of the commission, or of any court, made, issued, are entered under the provisions of this act, shall observe, obey and comply with such regulations or orders, and the terms and condition thereof, so long as the same shall remain in force. 1937, May 28, P.L. 1053, art. IX, \$907.

bb. \$1348. Inspection of, and access to, facilities and records of public uti ≥ € €

The commission shall have full power and authority, either by or through the members, or duly authorized representatives, whenever it shall deem it necessary proper, in carrying out any of the provisions of this act, or its duties under to enter upon the premises, buildings, machinery system, plant, and equipment and make any inspection, valuation, physical examination, inquiry, or inverse tion of any and all plant and equipment, facilities, property, and pertinent remains books, papers, memoranda, documents, or effects whatsoever, of any public utility, and to hold any hearing for such purposes. In the performance of such duties, the commission may have access to, and use any books, records.

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y political subdivision thereof. 1937, May 28, P.L. 1053, art. IX,

Contracts; power of the commission to vary, reform or revise

nission shall have power and authority to vary, reform, or revise, reasonable, and equitable basis, any obligations, terms, or conditions act heretofore or hereafter entered into between any public utility and corporation, or municipal corporation which embrace or concern ht, benefit, privilege, duty, or franchise, or the grant thereof, or se affected or concerned with the public interest and the general well Commonwealth.

er the commission shall determine, after reasonable notice and hearing, on motion or upon complaint, that any such obligations, terms, or are unjust, unreasonable, inequitable, or otherwise contrary or the public interest and the general well being of the Commonwealth, the shall determine and prescribe by findings and order, the just, reasonequitable obligations, terms and conditions of such contract. Such connodified by the order of the commission, shall become effective thirty the service of such order upon the parties to such contract. 1937, .L. 1053, art. LX, 5920.

. Complaints

ommission, or any person, corporation, or municipal corporation having at in the subject matter, or any public utility concerned, may complain g, setting forth any act or thing done or omitted to be done by any public violation, or claimed violation, of any law which the commission has juriso administer, or of any regulation or order of the commission. Any public or other person, or corporation, subject to this act, likewise may complain egulation or order of the commission, which the complainant is or has been d by the commission to observe or carry into effect. The commission, by ion, may prescribe the form of complaints filed under this section. 1937, P.L. 1053, art. X, \$1001.

395. Decisions by commission

er the conclusion of the hearing, the commission shall make and file its gs and order with its opinion, if any. Its findings shall be in sufficient to enable the court on appeal, to determine the controverted question nted by the proceeding, and whether proper weight was given to the evid-A copy of such order, certified under the seal of the commission, shall rves by registered mail upon the person, corporation or municipal corporation at whom it runs, or his attorney, and notice thereof shall be given to the parties to the proceedings, or their attorney. Such order shall take and become operative as designated therein, and shall continue in force for a period which may be designated therein, or until changed or revoked ne commission. If an order cannot, in the judgment of the commission, be olled with within the time designated therein, the commission may grant and eribe such additional time, as, in its judgment, is reasonably necessary to ply with the order, and may, on application and for good cause shown. and the time for compliance fixed in its order. 1937, May 28, P.L. 1053, art. 11005.

ff. \$1398. Investigations

The commission may, on its own motion and whenever it may be necessary the performance of its duties, investigate and examine the condition and ment of any public utility or any other person or corporation subject to this so in conducting such investigations the commission may proceed, either with we hout a hearing, as it may deem best, but it shall make no order without ing the parties affected thereby a hearing. 1937, May 28, P.L. 1053, art 1.50

B. Utilities Gross Receipts Tax

72 P.S. \$8101

Every railroad company, pipeline company, conduit company, steamber company, canal company, slack water navigation company, transportation company, and every other company, association, joint-stock association, limited partnership, now or hereafter incorporated coorganized by or under law of this Commonwealth, or now or hereafter organized or incorporated by ... state or by the United States or any foreign government, and doing business h. this Commonwealth, and every copartnership, person or persons owning, q_{eve} ing or leasing to or from another corporation, company, association, joint rate association, limited partnership, copartnership, person or persons, any reroad, pipeline, conduit, steamboat, canal, slack water navigation, or other sefor the transportation of freight, passengers, baggage, or oil, except taxing motor lises and motor omnibuses, and every limited partnership, associating joint-stock association, corporation or company engaged in, or hereafter erecin, the transportation of freight or oil within this State, and every telephore company, telegraph company, express company, electric light company, were power company, hydroelectric company, gas company, palace car company *** sleeping car company, how or hereafter incorporated or organized by or unter law of this Commonwealth, or now or hereafter organized or incorporated by poother state or by the United States or any foreign government and doing but het this Commonwealth, and every limited partnership, association, joint-stock access copartnership, person or persons, engaged in telephone, telegraph, express * light and power, waterpower, hydro-electric, gas, palace car or sleeping : 🖈 🔄 in this Commonwealth, shall pay the the State Treasurer, through the Department Revenue, a tax of forty-five mills upon each dollar of the gross receipts of the a tion, company or association, limited partnership, joint-stock association, evership, person or persons, received from passengers, baggage, and freight tree " wholly within this State, from express, palace car or sleeping car business 2 ** wholly within this State, or from the sales of electric energy or gas, except ("* receipts derived from sales of gas to any municipality owned or operated part # 3 and except gross receipts derived from the sales or resale of electric energy # 17 persons. partnerships, associations, corporations or political subdivisions 14 * to the t. mp. sec by this act upon gross receipts derived from such resale ... from the transportation of oil done wholly within this State. The gross receipt gas companies shall include the gross receipts from the sale of artificial and the gas, but shall not include gross receipts from the sale of liquefied petroleum (" The said tax shall be paid within the time prescribed by law, and for the part * of ascertaining the amount of the same, it shall be the duty of the treasurer of the proper officer of the said company, copartnership, limited partnership, asset joint-stock association or corporation, or person or persons, derived from 1.12 and of gross receipts from business done wholly within this State, during the of twelve months immediately preceding January I of each year. It shall be to duty of the treasurer or other proper officer of every such corporation or ask. every individual liable by law to report or pay said tax, except municipalities. 3

to the Department of Revenue on or before April 30 of each year, a tre report in like form and manner for each twelve month period beginning and 1, of each year. The tentative report shall set forth (i) the amount of receipt received in the period of twelve months next preceding and reported security received in the gross receipts received in the first three months annual report; or (ii) the gross receipts received in the first three months of current period of twelve months; and (iii) such other information as the strength of Revenue may require.

Tyon the date is to make the report is required to be made, the corporation, settlen or individe the aking the report shall compute and pay to the Departion of Revenue on account of the tax due for the current period of twelve months at election (i) for the car 1971 not less than twenty-nine and one-third mills are dollar amount of its gross receipts reported for the entire preceding period of the dollar amount of its gross receipt received within the first with mills of the dollar amount of its gross receipt received within the first months of the current period of twelve months. Notwithstanding any other sion in this section to the contrary, for the year 1972 and each year thereafter corporation, association or individual making a tentative report shall transmit are report to the Department of Revenue on account of the tax due for the current are report to the Department of Revenue on account of the tax due for the current are provisions of the act of March 16, 1970 (P.L. 180).

The time for filing reports may be extended, estimated settlen ats may be made in the Department of Revenue if reports are not filed, and the penalties for fail-14 to file reports and pay the tax shall be as prescribed by the laws defining the paers and duties of the Department of Revenue. In any case where the works of any arporation, company, copartnership, association, joint-stock association, limited athership, person or persons, the taxes imposed by this section shall be apporand between the companies, companies, copartnerships, associations, jointeck associations, partnerships, person or persons in accordance with teterms of their res, dive leases or agreement, but for the payment of the said axes the Commonwea th shall first look to the corporation, company, copartnermip, association, joint-stock association, limited partnership, person or persons rerating the works, and upon payment by the said company, corporation, copartnership, association, joint-stock association, limited partnership, person or persons of a tax upon the receipts, as herein provided, derived from the operato thereof, no other corporation, company, copartnership, association, jointexk association, limited partnership, person or persons shall be held liable under his section for any tax upon the proportion of said receipts received by said exporation, company, copartnership, association, joint-stock association, trited pertnership, person or persons for the use of said works.

This article shall be construed to apply to municipalities, and to impose a tax upon the gross receipts derived from any municipality owned or operated public willity or from any public utility service furnished by any municipality, except willity or from any public utility service furnished by any municipality, except will gross receipts shall be exempt from the tax, to the extent that such gross that gross receipts are derived from business done inside the limits of the municipality, service, swing or operating the public utility or furnishing the public utility service, will, March 4, P.L. -, No. 2, art. XI, \$1101, as amended 1971, Aug. 31, P.L. -, No. 93, \$7.

C. Pa. P.U.C. - Tariff Regulations

*. Section II. PUBLIC NOTICE OF TARIFF CHANGES

1. Unless the Commission otherwise orders, no public utility to which these rules apply shall make any change in any existing and duly established tariff except after sixty (60) days' notice to the public.

Each notice shall plainly state the changes proposed in the tariff then in force, and the date on which the changes will become effective.

b. Section VIII. DISCOUNT FOR PROMPT PAYMENT AND PENALTIES FOR →

Every public utility that imposes penalties upon its customers for fallows as pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly as exact circumstances and conditions in which the penalties are imposed or a counts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment.

D. Pa. P.U.C. - Cactric Regulations

Rule 14 - ADJUSTALINT OF BILLS FOR AVERAGE METER ERROR

D. ACCESS TO METERS - The public utility shall at all reasonable times are access to meters, service lines and other property owned by it on customers premises, for purposes of maintenance and operation. Neglect or refusal on the part of customers to provide reassonable access to their premises for the exampurposes shall be deemed to be sufficient cause for discontinuance of service.

E. Metropolitan Edison Company Electric Tariff Electric Pa. P.U.C. No. 41

Rule 15. Cause for discontinuance of service:

Company reserves the right to discontinue its service on reasonable nairs and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulatres, or, without notice, for a use, fraud, or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waive thereof.

Should the Company's service be terminated for any cause aforesaid, the minimum charge for the unexpired portion of the term shall become due and per able immediately, provided, however, that if satisfactory arrangements are subsequently made by Customer for reconnection of the service (in which even a reconnection charge of not less than \$1.00 must be paid) the immediate payrels of the minimum charge for the unexpired portion of the contract term may be waived or modified as the circumstances indicate would be just and reasonable

Company may refuse its service to, or remove its service from, any installation which, in the judgment of Company, will injuriously affect the operation of Company's system or its service to other Customers.

Issued April 30, 1971.

Effective June 30, 1971

F. Kansas Statutes Annotated

E.S.A. \$66-101

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Fower, authority and jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the

edilties, including radio common carriers, and all common carriers, and all common carriers, and all common carriers, and is empowered to such a tales necessary and convenient for the exercise of such power, authority inspection.

Federal Statutes

U.S.C. \$1983 Civil action for deprivation of rights

trry person who, under color of any statute, ordinance, regulation, custom to the state or Territory, subjects, or causes to be subjected, any said of the United States or other person within the jurisdiction thereof to reprivation of any rights, privileges, or immunities secured by the Constant and laws, shall be liable to the party injured in an action at law, suit starty, or other proper proceeding for redress.

\$. 28 U.S.C. \$1343 Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action will be law to be commenced by any person:

- 3) To recover damages for injusy to his person or property, or because the deprivation of any right or privilege of a citizen of the United States. any act done in furtherance of any conspiracy mentioned in section 1985 and the 42;
- (1) To recover damages from any person who fails to prevent or to aid in recenting any wrongs mentioned in section 1985 of Title 42 which he had taxifiedge were about to occur and power to prevent:
- (3) To redress the deprivation, under color of any State law, statute, *inance, regulation, custom or usage, of any right, privilege or immunity *traced by the Constitution of the United States or by any Act of Congress rewiding for equal rights of citizens or of all persons within the jurisdiction of the United States.
- (4) To recover damages or to secure equitable or other relief under any Act Congress providing for the protection of civil rights, including the right to 4.6. June 25, 1948. c. 646, 62 Stat. 932; Sept. 3, 1954. c. 1263, 542, 68 Stat. 64. Sept. 9, 1957. Pub. L. 85-315. Part III, 5121, 71 Stat. 637.

H. United States Constitution

fourteenth Amendment Section 1 One Process Clause

... nor shall any state deprive any person of life, liberty or property without due process of law . . .

Man, Seventy-one, Freezes to Death After Utility Shuts Off Gas, United Press International, appearing in Boston Globe, (Feb. 9, 1974), p. 17

Man, 71, freezes to death after utility cuts off gas

United Press International

MILWAUKEE — Everybody is sorry about what happened to Harold Radtke.

The Wisconsin Public Service Corp. (PSC) turned off the gas at Radtke's benne in Peshtigo Jan. 28 bencause he had not paid his gas bill for three months.

The 71-year-old bachelor's frozen body was found Tuesday, lying face up on the floor of his home, dressed in five shirts. There were several blankets on his sleeping couch. Radike had apparently been trying to get warmth from a vacuum cleaner motor and an electric heating plate.

The temperature outside was 1 digree above zero. Inside it was 20. Pans or water on the stove were frozen. So were the toilet and the kitchen sink.

A spokesm for the PSC said yesterday it was "a horrible tracedy." But he denied the company had done anything wrong.

The trouble was that Radtke had not paid a \$128 gas bill in three months. He had been warned and had indicated he would pay. But he didn't.

The last time Radike's heat was turned off in June, his brother, Wilbert, of Lewiston, Idaho, paid the bili. The brother and the bili. The brother and to let him know. The PSC said it has no record of that

Elderly Couple Found Frozen in Syracuse Home, The New York Times, Dec. 26, 1973.

"IE NEW YORK TIMES, WEDNESDAY, DECEMBER 26, 1973

Elderly Couple Found Frozen in Syracuse Home

SCHENECTADY, N.Y., Dec. Grandson Discouers Bodies
12 (UPI) — A man and his offer both in their 90's wore Utility Had Cut Off Power cuss it, at power campany for lionpayment of Bill

found dead yesterday, apparently frozen to death in their wheated home.

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cound dead yesterday, appar-inty frozen to death in their present home.

Basil Heise, a serviceman on nonpayment of a five-month-ispoke.nin said.

boliday leave, discovered the old \$102 b.H.

Basil Heise, a serviceman on inonpayment of a five-month is bodies of Mis grandpronts when he went to their home to take them to a Christians Her to a Christians Her

spokesman said.

the telephone

Service of the within and receipt of a copy thereof is hereby admitted this......day of April, A.D. 1974.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5845

CATHERINE JACKSON, on behalf of herself and all others similarly situated,

Petitioner,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania utility corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

MOTIONS FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

RICHARD A. HASSE
EDWARD J. DAILEY
Attorneys for the National
Consumer Law Center, Inc.
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Boston, Massachusetts 02108

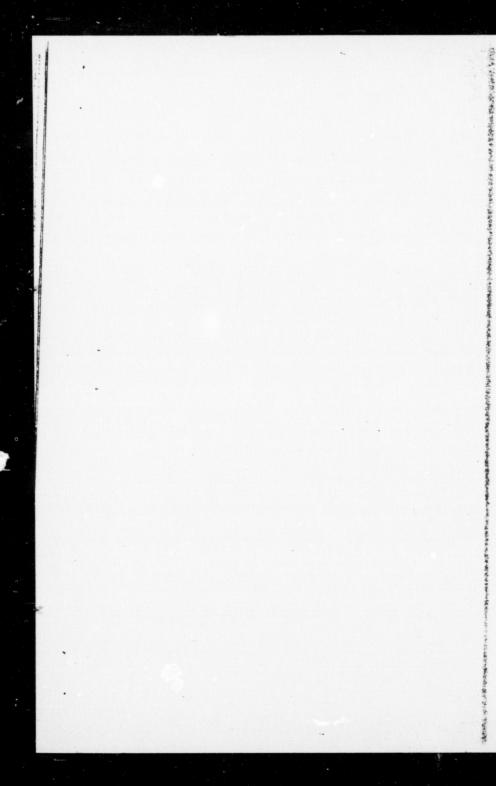
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EXHIBIT

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Pursuant to Rule 42 of the Rules of the Supreme Court Advocates For Basic Legal Equality, Inc. (ABLE) and the Ohio State Legal Services Association also apply to the Court for leave to file the enclosed brief Amica, Curiae in support of the Petitioner, Catherine Jackson.

ABLE is a private, nonprofit legal services programs serving the Toledo area. Its attorneys have represented the class plaintiffs in Palmer v. Columbia Gas of Ohio. Inc., 342 F. Supp. 241 (N.D. Ohio W.D. 1972), 479 F.25 153 (6 Cir. 1973), a residential utility service termination action which has raised issues similar to those before this Court. Ohio State Legal Services Association is a statewide legal services program which has appeared as Amicus Curiae before the court of appeals in Palmer v. Columbia Gas and has been substantially involved in judicial and administrative litigation to apply procedural safeguards to residential utility service.

Given their direct involvement with issues similar to those before the Court, ABLE and the Ohio State Legal Services Association have a significant interest in the action before this Court and an experience which enables these programs to present a brief Amicus Curiae which will aid the Court in its deliberations.

Respectfully submitted,

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STATEMENT OF THE ISSUE

At issue here is the asserted right to prior notice and reportunity to contest a proposed termination of resistial utility service. Petitioner claims that residential mity service is a property interest and entitlement to a seessity of life which, by law, must be extended to all assumers subject only to reasonable conditions of eligiality and payment. And where, as in the Commonwealth Pennsylvania, that service is provided by a utility exporation which is engaged in a public function, subat to substantial regulatory control, joint beneficiary of a state created monopoly, and required to conform its ervice and termination practices to a statutory standand of reasonableness and regulatory review, the state's involvement is of such substance as to subject the corcoration's affairs to the Fourteenth Amendment. Acting under color of law, the corporation cannot, therefore, terminate residential utility service without compliance with minimum requisites of due process of law.

STATEMENT OF THE CASE

Petitioner Catherine Jackson brought an action under the Civil Rights Act, 42 U.S.C. § 1983, on behalf of herself and all others similarly situated against the Respondent Metropolitan Edison Company, a regulated Pennsylvania utility corporation. Seeking damages, injunctive, and declaratory relief, Petitioner has challenged the corporation's practice of summary termination of residential utility service upon its allegation of nonpayment, abuse, fraud, or tampering and without notice of and opportunity to contest. Petitioner asserts that this challenged termination procedure, pursuant to the corporation's Electric Tariff No. 41, fails to comply with the requisites of procedural due process of law under the Four-

teenth Amendment to the Constitution of the United

The district court dismissed the complaint for failure to state a cause of action under the Civil Rights Act Characterizing the challenged practice as the product of internal corporate action without specific authorization by the Commonwealth of Pennsylvania, the court ruled that Metropolitan Edison does not act under color of law. 348 F. Supp. 954 (M.D. Pa. 1972).

On appeal to the third circuit, Petitioner objected to the district court's narrow analysis of the issue of state action. Petitioner argued that government in not neutral where a utility corporation is engaged in a public function, subject to substantial regulatory control, beneficiary of a state authorized monopoly, and required by statute to conform its service and termination practices to a statutory standard of reasonableness and regulatory review. Nor is government neutral where it is a direct economic beneficiary of a utility corporation's business practices. And government is not neutral where its grant of monopoly status creates substantial economic advantage to the corporation and denies alternative sources of residential utility service to consumers.

Upon review, the court of appeals ignored these indices of action under color of law and affirmed the decision below. 483 F.2d 754 (3d Cir. 1973). It viewed government action as limited solely to a regulatory requirement that Metropolitan Edison file its internal tariff regulations with the Public Utility Commission. 483 F.2d at 758. The court also rejected Petitioner's argument that residential utility service is a protected property interest to which the fundamental safeguards of the Fourteenth Amendment apply. It therefore dismissed Petitioner's claim as de minimus and of no co cern to the federal judiciary.

SUMMARY OF THE ARGUMENT

Under contemporary conditions and in our highly technological society, light, heat, power, water, and communitions services are prime necessities of life, any one of which may affect health, livelihood, and life itself. Yet animary termination of residential utility service annually affects countless thousands of residential utility consumers throughout the United States. The practice is characterized by impersonal bureaucracy, computer error, inefficiency, and unresponsiveness. Its failure of procedural safeguard and simple fairness leads to erroneous, mistaken, and arbitrary denial of service to those citizens who can least afford this loss. The result is life-threatening hazard to those who cannot afford the pay now—sue later' remedy suggested by the court of appeals in this case.

Utility corporations have largely avoided procedural infeguards in the past because they have been uncritically defined as private businesses. Now, however, it is urged that these public enterprises are not private corporations in the ordinary sense of the term. A multi dimensional analysis of the indices of state action defined by this Court demonstrates that the private label is an unwarranted shield against the Fourteenth Amendment's requirement of fair dealing.

In the case before the Court, it is noted first that Metropolitan Edison is a state created, protected, and controlled monopoly. This government monopoly represents a relationship between the state and corporation which cannot be compartmentalized as private or public; indeed, the two are merged in fact. And this merger results in an identity of purpose and conduct and a mutual economic advantage from which neither public nor private can be separated. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Monopoly also results in restricted access enforced by the state. It differs from the mere license found is Moose Lody 2 107 v. Irvis, 407 U.S. 163 (1972), in that the direct and immediate result of government's creative of the monopoly is a complete denial of alternative sources of utility service. The Commonwealth of Pennsylvania has put the weight of its authority behind the practices of a single corporation and has transformed what in the market economy is a mere refusal to deal into an absolute denial of a necessity of life. Therefore, its monopoly has legitimized, facilitated, and given the force and effect of law to that denial.

Beyond the fact of monopoly, state action is apparent in the pervasive regulation of every significant aspect of Metropolitan Edison's business. Moreover, there is specific statutory—regulatory authorization for the summary termination practices contested here. Finally, there is the fact that the corporation is engaged in a public function in providing residential utility service in behalf of the Commonwealth of Pennsylvania.

The conclusion which follows from this collective assessment is inescapable. Metropolitan Edison is not a private business in the ordinary sense. As a government created, protected, and controlled monopoly, it is joined with the Commonwealth to carry out a public purpose for public benefit. It acts under color of law. It is therefore held to the mandate of due process of law. Fuentes v. Shevin, 407 U.S. 67 (1972).

THE PURPOSE OF THIS LITIGATION IS TO ATTAIN PRACTICAL DUE PROCESS SAFEGUARDS FOR THOSE CONSUMERS WHO FACE ERRONEOUS, MISTAKEN, OR ARBITRARY DENIAL OF RESIDENTIAL UTILITY SERVICE

The following letter was sent to the Hartford Gas Company in February 1891.

Dear Sirs:

Some day you will move me almost to the verge of irritation by your chuckle-headed Goddamned fashion of shutting your Goddamned gas off without giving any notice to your Goddamned parishioners. Several times you have come within an ace of smothering half of this household in their beds and blowing up the other half by this idiotic, not to say criminal, custom of yours. And it has happened again today. Haven't you a telephone?

Ys. S.L. Clemens —Mark Twain's Notebook, (Harper & Row)

A. Summary Termination Of Residential Utility Service Is An Issue Of National Scope

As the foregoing reference to Mark Twain indicates, summary termination is an historical issue. It is also a problem of national scope which annually affects many thousands of residential customers of utility corporations. The summary termination remedy has, until recently, been a universal practice of public utilities throughout the United States. It is dictated by a corporate concern for protection of assets. It is characterized by impersonal bureaucracy held together by computers, where inefficiency and a high level of error are the norm and unresponsiveness the only remedy. Yet its failure of procedural safeguard and simple fairness leads to erroneous, mistaken, and arbitrary denials of utility service to those who can least afford this loss.

Amicus urges the Court's attention to the stope of the issues presented here. Summary denial of utility services is an issue which extends far beyond the Petitioner the class of 300,000 consumers whom she represents. It is an issue of societal import.

In Toledo, for example, a utility corporation serving 140,000 customer accounts issued 120,000 - 140,000 shu: off notices annually. Of these, 6,000 (4% of the corporation's accounts) resulted in termination. The court of appeals described the utility's collection and termination procedures as far worse than imperfect and characterized the results of those procedures as having a potential for tragedy. Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153, 158 (6th Cir. 1973). Typical of the experiences cited by the court of appeals is that of a father of seven children who pleaded with a collections employee to restore his utility heating service which had been terminated after full payment of the account. The employee · responded, "Tough. Pay the bill again." Palmer at 158. The temperature in the man's home reached 45° before intervention of an in Jaential community representative caused restoration of the service. Other customers of the corporation suffered termination in the face of disputed accounts, current accounts, admittedly erroneous billing, and even accounts which had been paid in full. Only the intervention of ministers and important community persons seemed capable of gaining restoration of service to some of these consumers.

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Adopting the district court's evaluation of the utility's practices, the court of appeals concluded:

The evidence as a whole revealed a rather shockingly callous and impersonal attitude upon the part of the defendant, which relied uncritically upon its computer, located in a distant city, and the far from infallible clerks who served it, and paid no attention

to the notorious uncertainties of the postal service. Palmer at 158.

In New York City, Consolidated Edison's collection and termination practice has been described by the disrict court as a bizarre "Orwellian nightmare". There, 76 year old widow, upset at a sudden and drastic inrease in the amount of her electric bill, caused an investigation to be made which resulted in the discovery by the utility company that her landlord had diverted current through her meter. Nevertheless, the higher bills continued for six months at which time her service was terminated for refusal to pay the excess amount. After living in the dark for three weeks, she obtained emergency assistance from the welfare department and paid the bill. However, Consolidated Edison lost the check, re-entered the deficit upon her account, and again threatened to terminate her service. Bronson v. Consolidated Edison Co. of New York, Inc., 350 F. Supp. 443, 444, 445 (S.D.N.Y. 1972). Thereupon, she obtained counsel and sought injunctive relief against the corporation. So shoddy was Consolidated Edison's accounting, however, that, in defense, it asserted no record of the plaintiff as a customer. Bronson at 445.

In Atlanta, a municipal water utility terminated service to a tenant who refused to pay his slum landlord's delinquent account even though the tenant offered to pay for all current and future service to his residence. Davis v. Weir, 328 F. Supp. 317, 318 (N.D. Ga. 1971), 359 F. Supp. 1023 (1973). In St. Paul, San Francisco, Presque Isle (Maine), and Boston, tenants were similarly terminated without warning or notice because of landlord failure to pay delinquent accounts. See Jackson v. Northern States Power Co., 343 F. Supp. 265 (D. Minn. 1972); Freeman v. Frye, Civil No. C-72-350 (N.D. Calif. 31 Oct. 1972); Proceedings before Public Utilities Commission, State of Maine, Proposed General Order 36 (Jan.

1974); Hanrihan v. Boston Edison Co., Civil No. 72. 3900T (D. Mass., filed Jan. 1973).

In Denver, a husband and wife faced summary termination at their new residence because of an arrearage at their former residence which had admittedly resulted from the utility's metering error. The customers offered to pay the arrearage in instalments while continuing to pay their current account in full. The offer was rejected; they were told to "pay or else"; and their service was terminated. Hattell v. Public Service Co. of Colorado. 350 F. Supp. 240, 241 (D. Colo. 1972).

In Milwaukee, where the Wisconsin Electric Power Company annually terminates 10,000 accounts for alleged nonpayment (2% of its 600,000 accounts), a customer who disputed a billing charge of \$9.89 faced termination of his residential service without having been afforded the opportunity for impartial hearing to contest that charge. Lucas v. Wisconsin Electric Power Co., 466 F.2d 638 (7th Cir. 1972).

The actions described here are typical of the numerous judicial and administrative cases which have litigated the collection and termination practices of utility corporations throughout the United States during the past five years. Without question, these cases demonstrate that the issue of erroneous, mistaken, and arbitrary termination is of societal scope. These cases demonstrate also that utility corporations, in their singular dedication to the balance sheet, have ignored both the rule of fundamental fairness and the harsh impact of summary termination.

B. Procedural Safeguards Are Necessary To Protect This Necessity Of Life

Because summary collection and termination practices are directed at the poor, the severe consequences of denial of utility services are often unnoticed in the larger so-

ciety. See generally Shelton, The Shutoff of Utility Services for Nonpayment: A Plight of the Poor, 46 Wash. I. Rev. 745, 748-752 (1971). Those who have not lived under the threat of termination dismiss the fact of termination as if loss of service were of little more consequence than loss of a 50 cent lottery ticket. See opinion below at 759. Until some dramatic event such as this winter's exposure deaths thrusts reality to the fore, we fail to recognize that loss of residential utility service is an absolutely life threatening hazard to the poor, disabled, unemployed, and those of modest income who cannot afford the 'pay now—sue later' remedy suggested by the court of appeals. See opinion below at 760.

Under contemporary conditions and in our highly technological society, light, heat, power, water, and communication services are prime necessities of life, any one of which may affect health, livelihood, and life itself. The loss of telephone service, for example, is a threat to life for an elderly person who relies upon his telephone to reach emergency medical assistance. Similarly, the loss of electrical service is a harrowing and frightening experience to a widow in New York City. And the loss of heat is a threat to health and life for a mother and her two children who face illness and exposure after termination of that service.

Were utility service a mere consumer convenience, necessary for proper operation of televisions and frost-free refrigerators, the termination practices of Metropolitan Edison would not be challenged before this Court. That, however, is not the case.

The evidence leaves no doubt whatever that the consequences of shutting off gas service inflicts hardships upon the consumer that far transcend the loss of driving privileges, Bell v. Burson, 402 U.S. 535 90 (1971), delay in paying unemployment compensation, California Dept. of Human Resources Devel-

opment v. Java, 402 U.S. 121 (1971), or even the denial of direct relief payments, Goldberg v. Kelly. 397 U.S. 263 (1970). A person can freeze to death or die of pneumonia much more quickly than he can starve to death. Palmer v. Columbia Gas of Ohio. Inc., 342 F. Supp. 241, 244 (N.D. Ohio W.D. 1972).

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This winter's energy shortages have confirmed our society's real dependence upon utility services. A highly technological society simply cannot revert to a nineteenth century lifestyle of kerosene lanterns and wood burning fireplaces. Indeed, a shortfall of 12% has resulted in a severe economic downturn, loss of 250,000 jobs, and substantial hardship to many Americans. Contrasting this shortfall with the complete loss and denial which results from termination of utility services, it is apparent that loss of residential utility service is loss of a necessity of life and a life threatening hazard. It is apparent also that utility service should not be denied without safeguards to consumers.

C. Practical Safeguards Are Not Subversive Of Private Business

The right to public utility services may not rank with the franchise, or with procedural due process in criminal cases, on a conventional scale of liberties, but to the poor or disadvantaged nothing may be more immediately important than fair treatment by those who supply the needs of their daily existence. William F. Eich, Chairman, Public Service Commission of Wisconsin, *Public Power* 32 (Nov. 1973).

The safeguards advocated here are nothing more than practical implementation of our historic commitment to fundamental fairness and the rule of law. Due process attempts only to protect consumers from mistaken, erroneous, or arbitrary denial of utility services. Contrary to the rhetoric of utility corporations, due process is not a radical effort to bankrupt private busin s. See, in this

rd, the argument of Consolidated Edison in *Bronson*, F. Supp. at 448. Nor is it a naive, unworkable atto institutionalize the Fourteenth Amendment mand of fairness.

n the first instance, the cost of due process is not ly to bankrupt utility corporations because it is a of service which can be borne by consumers through rate structure. See Bonbright, PRINCIPLES OF BLIC UTILITY RATES 66 (1961). Nor is due proca radical concept except insofar as fair dealing is a val concept for many utility corporations. And due ocess is not an attack upon the legitimate freedom of vate business. The state created, state protected, and te regulated monopoly is not a traditional private busiss in the open market. At best, a utility corporation is hybrid, more akin to a government authority than it is a competitive private business in the market economy. herefore, the utility's use of a private business label ould not shield it from the mandate of the Fourteenth mendment.

Finally, due process is not an unworkable concept. Its racticality is readily demonstrated in those jurisdicons which are implementing a variety of review and earing procedures for residential utility service conumers. See generally Massachusetts Department of Pubc Utilities Regulation, DPU No. 16696; Michigan Pubic Service Commission Regulations Governing Consumer And Billing Practices (1974); New York Public Service Commission Opinion No. 73-16 (9 May 1973); Vermont ablic Service Board General Order 57 (1974); City of Youngstown Health Department Water Service Regulations (1973). See also the relief directed by the court in Palmer v. Columbia Gas, Civil No. (72-14, N.D. Ohio, W.D., Memorandum and Order, 5 April 1974), and the Model Regulations drafted by Amicus. Model Residential Utility Service Regulations (National Consumer Law Center, Inc., Boston, 1974). Most comprehensive of these are the Michigan, Vermont, and Model Regulations which provide a right to informal review and impartial hearing prior to termination of service.

- II. A PUBLIC UTILITY CORPORATION WHICH IS A JOINT BENEFICIARY OF A GOVERNMENT CREATED, PROTECTED, AND CONTROLLED MONOPOLY; ENGAGED IN A PUBLIC FUNCTION; SUBJECT TO SUBSTANTIAL REGULATION; AND REQUIRED TO CONFORM ITS PRACTICES TO AN AFFIRMATIVE STATUTORY STANDARD OF REASONABLENESS ACTS UNDER COLOR OF LAW WHERE IT TERMINATES RESIDENTIAL UTILITY SERVICE WITHOUT PRIOR NOTICE AND OPPORTUNITY TO BE HEARD
 - A. The Issue Of Action Under Color Of Law Requires A Comprehensive, Multi-Dimensional Analysis Of The Scope, Extent, And Substance Of Government Involvement With Challenged Practices

Although the opinion below first suggests adoption of the broad, flexible, and comprehensive approach mandated by Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), the court of appeals has, in fact, embraced a narrow, fixed concept of action under color of law. Following a similar decision in Lucas v. Wisconsin Electric Power Co., 466 F.2d 638, 655 (7th Cir., 1972), its opinion focuses upon a one dimensional index, that of specific governmental authorization for and direction of the challenged practices of Metropolitan Edisor Let even there, when faced with a statute which clearly satisfies that index, the court dismisses it as a mere notice filing requirement which does not clothe the utity's termination tariff with the force and effect of law. 483 F.2d at 758. See hereinbelow at Part II B 3.

More importantly, perhaps, the court's approach overoks several additional and significant indices which emonstrate state action in this case. It dismisses the conopoly position of Metropolitan Edison without queson as to the significance of the Commonwealth of Penngivania's creation, protection, and control of that monoply. Similarly, it dismisses the fact of mutual economic enefit which is conferred upon the utility corporation and the Commonwealth by statute. It does not recognize he pervasive regulatory scheme which necessarily inolves the state of the challenged practices of Metroolitan Edison. And it ignores the fact that the utility erporation is engaged in a public function. In short, the court of appeals has eschewed the multi dimensional approach of Burton and has dismissed or ignored these everal indices of state action which are relevant to its inquiry.

The issue of action under color of law is not so limited as the court of appeals would have it. There is no singular test or index which is to be applied to consumer due process actions. Rather, state action is a function of a range of factors which collectively demonstrate the scope, extent, and substance of government involvement with participation in, and relation to challenged practices. This is the rule of Burton and its most recent restatement, Moose Lodge 107 v. Irvis, 407 US. 163, 172 (1972). See also United States v. Guest, 383 U.S. 715, 723-725 (1966). And among the recognized factors which are relevant to this action are monopoly and economic interdependence, Burton, Moose Lodge; substantial regulation, American Communication Assn. C.I.O. v. Douds, 330 U.S. 382 (1950), Public Utilities Commission v. Pollak, 343 U.S. 451 (1952); direct governmental authorization or encouragement for challenged conduct, Pollak, Evans v. Newton, 382 U.S. 296 (1966), Reitman v. Mulkey, 387 U.S. 369 (1967); and public function or governmental purpose, Marsh v. Alabama, 326 U.S. 501 (1946), Burton.

The courts of appeals' approach is clearly inconsistent with the decisions of this Court. The opinion below declines comprehensive consideration of every variable which is relevant to the issue of the termination practices of Metropolitan Edisor. Had the court given substantive review to each of the indices set forth herein, it would have been compelled to the conclusion that the involvement of the Commonwealth constitutes action under color of law and therefore subjects Metropolitan Edison to the Fourteenth Amendment requirement of fairness and due process of law.

B. A Comprehensive Analysis Of State Action Should Consider The Relevance And Collective Significance Of Monopoly, Mutual Economic Benefit, Substantial Regulation, Statutory Authorization, And Public Function

Notwithstanding the private business label which the court of appeals has seized as a shield for Metropolitan Edison, it is evident that substance belies both the label and the shield. Simply stated, Metropolitan Edison is not a private business in the ordinary meaning of that term. It is, rather, a government monopoly engaged in the public function. It shares a structural and eccnomic interdependence with the Commonwealth of Pennsylvania and is largely controlled and protected from competition and financial loss by the Commonwealth of Pennsylvania. Moreover, it is pervasively regulated in every significant aspect of its business. In short, neither the utility corporation nor government can be separated. one from the other. Therefore, the residential termination practice of Metropolitan Edison carries the force and effect of law rather than the mere economic force and effect of a private corporate act. It is action under color of law.

1. Metropolitan Edison And The Commonwealth Act As Joint Participants In And As Joint Economic Benenciaries Of A Government Monopoly

Metropolitan Edison was chartered and issued a cerificate of convenience, in the first instance, to serve the ablic interest rather than the private interests of its corporators. Unlike the private corporation, it exists well at the will of government. 66 P.S. § 1171. Unlike the private corporation, it holds an exclusive franchise within its service area and is not subject to competition and the private controls of the market economy. 66 P.S. § 1121 et seq. Unlike the private corporation, it is guaranteed a fair rate of return by the state's regulatory rate structure. 66 P.S. §§ 1141-1148. Unlike the private corporation, it functions under pervasive statutory and regulatory controls which far exceed those to which private business is subject.

Private capital, competition, and influence govern the open market and distinguish private action from government action. These private controls further distinguish the market economy from the closed market in which a public utility operates. It is government which has established the closed market, which controls access to and operation in the market, which substantially regulates it, and which is the source of economic influence in the market. Moreover, it is government's grant of monopoly, rather than private investment, which is the basic source of a utility's existence, funding, and profitability in that market. The utility monopoly thus represents a basic restructuring of the market from private to government control.

This government monopoly may be viewed as analogous to a municipal utility, government corporation, or government authority. Each of these functions in a closed, government medical. In each, it is the government charter, franchise, or monopoly which is the source of the

entity's existence. While each may be the object of stantial private investment, that investment is predicated upon the entity's possession of an exclusive characteristic or monopoly. And to the extent that government is the source of the entity's existence and control, actions are the actions of government where fundamentights are at issue. See, for example, Meredith v. Alacteristic of the entity's existence and control, actions are the actions of government where fundamentights are at issue. See, for example, Meredith v. Alacteristic of the entity of the extent of the extent that government is the source of the entity's existence and control, actions are the actions of government where fundamentights are at issue. See, for example, Meredith v. Alacteristic of the entity of the extent of

At the very least, the government monopoly represen a relationship between the state and corporation which cannot be compartmentalized as private or public; indeed the two are merged in fact. See Stanford v. Gas Service Co., 346 F. Supp. 717, 721-722 (D. Kan. 1972); Bronso v. Consolidated Edison, 350 F. Supp. at 445; Ihrke Northern States Power Co., 459 F.2d 566, 569-570 (S: Cir. 1972). This merge" results in an identity of pur pose and conduct from which neither public nor priva; can be separated. It could not be otherwise; given the aversion to monopoly in American law, a monopoly law fully exists not as a private business but only to the ex tent that it is subject to public control and acts for public purpose. Therefore, the act of the utility cor poration is the act of the state, for government "has so far insinuated itself into a position of interdependence with the [corporation] that it must be recognized as a joint participant in the challenged activity, which on the account cannot be considered to have been so purely provate as to fall without the scope of the Fourteenth Amendment". Burton, 365 U.S. at 275.

Beyond this interdependence, there is a further, perhaps more significant result which rises from the fact of government monopoly, that of restricted access enforced 14

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the state. Monopoly differs from the mere license and in Moose Lodge in that the direct and immediate sult of government's creation of the monopoly is a comsete denial of alternative sources of utility service. In actrast to the finding in Moose Lodge, Catherine Jackso has no opportunity to take her business elsewhere. the Commonwealth has put the weight of its authority shind the practices of a single corporation and has insformed what in the market economy is a mere retaal to deal into an absolute denial of a necessity of ie. Moose Lodge, 407 U.S. at 177. Its monopoly has gitimized, facilitated, and given the force and effect of w to that denial. The exercise of the state created ower to effect that denial is therefore action under slor of law. Its arbitrary exercise is a denial of due process of law.

Finally, it should be noted that this government motopoly also generates mutual economic advantage to the corporation and the state. The benefit to Metropolitan Edison is apparent in its exclusive franchise and guarinteed fair rate of return. 66 P.S. §§ 1121, 1122, 1123, 1141, et seq. Unlike the private business, Metropolitan Edison is not subject to vagaries of the open market. Insulated from competition and the risk of a market economy, it is the beneficiary of substantial economic advantage in the form of a favorable balance sheet asared by government. Similarly, the advantage ') the Commonwealth is undeniable. Not only does the state receive the substantial benefit of general corporate income taxes levied upon utilities, but, more importantly, the Commonwealth is the direct beneficiary of special tax revenues from the gross receipts tax which is levied exclusively upon public utility corporations. 72 P.S. \$ 8101.

The court of appeals has erred in ignoring the significance of monopoly and economic benefit. This Court's decisions have attributed prime importance to these dices of public action. The lower court's dismissal these factors as unrelated to the issue of the Common wealth's relation to challenged conduct cannot stand the face of Burton, 365 U.S. at 723, 724, and Mondade, 407 U.S. at 174, 177. See also Ihrke v. Norther States Power Co., 459 F.2d at 568, 569. The interdependence evidenced by monopoly and economic advantagis action under color of law.

2. Government Is Directly Involved Where The Utility's Termination Tariff Has Been Frame Pursuant To A State Standard Of Reasonable ness And Is Subject To State Review, Authorization, And Approval

The court of appeals held that Metropolitan Edison's termination procedure is merely the product of internation procedure is merely the product of internation corporate action without acquiescence of or authorization by the Commonwealth of Pennsylvania. The only state involvement found by the court is a Public Utility Commission regulation, Tariff Reg. No. VIII, which requires utility corporations to set forth the conditions of service termination for nonpayment of accounts. This requirement, the court ruled, is not sufficient state involvement to satisfy the state action requirement. 483 F.2d at 758.

Tariff Reg. No. VIII, however, is not the only state regulation to be considered here. Not only has the courignored the fact of pervasive regulation, but it has overlooked specific statutory authorization for the challenged practice. The Public Utility Code, 66 P.S. § 1171, state inter alia:

Subject to the provisions of this act and the regulations or orders of the [Public Utility] Commission. every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service

regether with filing requirements of Tariff Reg. No. VIII, is statute subjects utility regulations governing condisions of service and termination to the regulatory authorist of the Public Utility Commission. It requires the mailty to adopt regulations acceptable to and to be approved by the commission. It mandates a statutory standard of reasonableness. It subjects the corporation's regulations to the enforcement and compliance authority of the commission. 66 P.S. §§ 1341, 1843, 1347.

Pursuant to section 1171, Metropolitan Edison has symulgated Electric Tariff No. 41 which provides its undecked authority to terminate utility service for alleged tenpayment, abuse, fraud, or tampering. This tariff has been formally presented to the Public Utility Commission under its requirements governing submission of proposed tariffs. Tariff Reg. Nos. I, II. And, it has been accepted and approved pursuant to the affirmative statuty requirement, 66 P.S. § 1342, which directs the commission to enforce all provisions of the Public Utility Code, including the reasonableness standard of section 1171.

It is evident that section 1171 directly and significantly involves the Commonwealth with the challenged practices. The statutory provision goes far beyond the simple notice-filing requirement of Tariff Reg. No. VIII died by the court: the Public Utility Commission is to define the standard of reasonableness; it is to review proposed regulations; it is to accept or reject these regulations. Once having required, reviewed, accepted, and approved the challenged tariff, the commission has vested Tariff No. 41 with the apparent authority of the Commonwealth and clothed the termination practice with the legitimacy of haw and an authority which could not otherwise be exercised apart from compliance with sections 1171, 1342 and Tariff Reg. Nos. I, II. Therefore, the tariff is no less an index of specific authorization than

was the termination statute recognized in Palmer v. Clumbia Gas, 342 F. Supp. at 245, or the regulator agency's approval in Pollak.

[W]hen authority derives in part from government thumb on the scales, the exercise of that power to comes closely akin, in some respects to its exercise by government itself. *Public Utilities Commission Pollak*, 343 U.S. 451, 462, n.8 (1952).

Compare Moose Lodge, 407 U.S. at 175, where there was no direct or specific governmental authorization for the discriminatory conduct of the private club. In that case the Commonwealth's involvement was limited to a general licensing requirement.

It may be argued in rebuttal that the commission ha not formally ratified Metropoliton Edison's Tariff No. 11 and therefore has not specifically approved its substance That argument is without merit. The commission is unde a statutory mandate to review proposed tariffs for compliance with section 1171. 66 P.S. §§ 1341, 1342. Whether the review is a formal or informal process is irrelevant to the issue of specific authorization. Certainly, there exists no rule which would have the issue of specific authorization turn on a distinction between formal and informal review. It is enough that the tariff has been submitted, as required, for review and approval. Not having been rejected formally or otherwise, the tariff is in effect and carries the approval and authority of the Commonwealth as a tariff which meets the statutory standard of reasonableness. Without that approval and authority, i: would have no force and effect and could not serve as justification for Metropolitan Edison's termination practices.

3. Government Is Directly Involved 1.2 The Challenged Practices Of The Monopoly Which It Pervasively Regulates

Metropolitan Edison is not the typical business entity which is subject to some regulation by the state. Rather, a general managerial function is subject to substantial wernmental intervention and control by statute, adzinistrative regulation, and the Public Utility Commisgon. Subject to statutory regulation under the Public Utility Code are its rates, 66 P.S. §§ 1141 et seq.; services and facilities, 66 P.S. §§ 1171 et seq.; termination of service, 66 P.S. § 1171; accounting and budgetary matters, 66 P.S. §§ 1211 et seq.; securities and obligations, & P.S. §§ 1241 et seq.; relations with affiliated interests, % P.S. §§ 1271 et seq. Subject to administrative regulation by the Public Utility Commission are its tariffs, dejosits, service charges, payment and termination procedures, discounts, complaints, records, systems operation, testing, electric cooperative associations, accounts and records. 66 P.S. §§ 452 et seq.; 66 P.S. §§ 1341 et seq.; Pennsylvania Public Utility Rules And Regulations Governing Matters Pertaining To Tariffs (1962); Pennsylvania Publice Utility Commission Electric Regulations (1968).

Government intervention and control of Metropolitan Edison is nothing short of pervasive. The corporation cannot operate or transact any business as a public utility without statutory authorization. Every significant part of its business as a utility is subject to comprehensive statutory and administrative regulation which reaches well beyond that to which a business corporation in the open market is subject. And broad enforcement authority is granted to the Public Utility Commission to compel corporate compliance with the Public Utility Code and regulations. 66 P.S. §§ 452 et seq.; 66 P.S. §§ 1341 et seq.; 66 P.S. §§ 1491 et seq.

This Court has repeatedly recognized close regulation as a primary index of action under color of law. When the state is "entwined in the management or control" of an entity or where that entity derives power from the state's regulatory intervention, it remains subject to the restraints of the Fourteenth Amendment. Evans v. New ton, 382 U.S. 296, 301 (1966); American Communications Assn. C.I.O. v. Douds, 339 U.S. 401 (1950). See also Public Utilities Commission v. Pollak, 343 U.S. at 462.

Similarly, several federal courts have adopted pervasive regulation as a key factor in the determination of action under color of law. Notably, the Court of Appeals for the Eighth Circuit has applied this index to a utility corporation's termination practices. Ihrke v. Northern States Power Co., 459 F.2d at 568. That court adopted the concurring opinion in Kadlec v. Illinois Bell Telephone Co., 407 F.2d 624 (7th Cir. 1969):

[I]t may be possible to demonstrate that a privatelyowned publicly-regulated utility or carrier or similar entity has a sufficient nexus with or dependence on a state as to make some of its actions under color of law. Some of the factors which should be considered are whether (1) the entity is subject to close regulation by a statutorily-created body, (2) the regulations filed with the regulatory body are required to be filed as a condition of the entity's operation, (3) the regulations must be approved by the regulatory body to be effective, (4) the entity is given a total or partial monopoly by the regulatory body, (5) the regulatory body controls the rates charged and cr specific services offered by the entity, (6) the actions of the entity are subject to review by the regulator. body, and (7) the regulation permits the entity to perform acts which it may not otherwise perform without violating state law. There may be other factors to be considered besides those here enumerated. The enumeration here of particular factors means that less than all may be sufficient to show

color of law in some cases and that nothing less than all may be required in other cases. Each case will depend on its facts. 407 F.2d at 628. See also Palmer v. Columbia Gas, 342 F. Supp. at 245; Stanford v. Gas Service Co., 346 F. Supp. 717, 721, 722 (D. Kan. 1972); Bronson v. Consolidated Edison Co., 350 F. Supp. at 445, 446; McQueen v. Drucker, 438 F.2d 781, 784-785 (1st Cir. 1971).

Metropolitan Edison meets the substantial regulation gerequisites suggested by the concurring opinion in Kadand adopted by Ihrke and related cases: (1) the cor pration is subject to close regulation by the Public Cility Commission; (2) the corporation must file its reg-Lations with the Public Utility Commission as a conditon of operation, 66 P.S. §§ 1142, 1171; (3) these regulaons must be approved by the Public Utility Commission be effective, 66 P.S. § .171; (4) the corporation is the sneficiary of a state granted monopoly in its service trea, 66 P.S. §§ 1121 et seq.; (5) the corporation's rates and services are controlled by the Public Utility Commission, 66 P.S. §§ 1141 et seq.; (6) the corporation's activities are subject to review by the Public Utility Commission, 66 P.S. § 1171; (7) the corporation is permitted to engage in business as a public utility and conopoly which it could not undertake without government authorization.

The opinion below dismisses the fact of pervasive regulation as insufficient to link the Commonwealth to the conduct of Metropolitan Edison. The error in the court's judgment is its failure to consider substantial regulation in the context of a range of variables which collectively demonstrate state action. Substantial regulation does not stand alone. In particular, the combination of government regulation, government monopoly, and specific authorization is the direct nexus between the state and what otherwise might be private conduct. Here it can be said that the fact of regulation, monopoly, and

specific authorization is such governmental intervention as to make joint venturers of the state and the utility. Moose Lodge, 407 U.S. at 177. Again, there is that interdependence and identity which cannot separate private from public.

4. Government Is Directly Involved In The Bus ness Of A Regulated Utility Corporation Which Is Engaged In A Public Function

In contemporary society, government has assumed it creasing responsibility for provision of basic services to the community. Among these are utility services which because of cost, technology, or the like, are not generally available to the public without intervention of the state. Often government has undertaken to provide these basic services through its own resources as in the case of a municipal utility or a state chartered utility authority. Alternatively, the state may charter a corporation to provide these services through a certificate of convenience. In either case, the utility is engaged in a public service and is subject to government regulation and control.

When the state has made the political determination to provide, control, or regulate a basic service, it is that decision which defines a public function and gives rise to state action. It is that decision which marks the transformation from private business to public purpose. "That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Evans v. Newton, 382 U.S. 296, 299 (1966). See also Marsh v. Alabama, 326 U.S. 501 (1946).

This public function rule is not simply the creation of recent American law. Its origin lies in our common law tradition where, historically, the state exercised a regulutory function over those businesses and professions

with supplied scarce goods and services to the committy. Those who provided such goods and services, wither tradesmen, physicians, innkeepers, or ferrymen, where held to a common law standard of fundamental stress. See Note, Constitutional Safeguards For Publication Customers: Power To The People, 48 N.Y.U. Rev. 492, 492-597 (1973); Ilardi, The Right To a string Prior To Termination of Utility Services, 22 in Talo L. Rev. 1057, 1061-1068 (1973).

Regulation of businesses engaged in public services as carried over in American law, Munn v. Illinois, 94 75. 113 (1876), and is apparent in regulatory control public utilities which has been in effect from an early pried of our history. See Note, supra, 48 N.Y.U. L. Rev. 1: 497; Bonbright, supra at 5-7. It is demonstrated also a numerous judicial opinions which have held that reginted utilities are affected with a public purpose and re therefore held to a standard of fundamental fairtes, now recognized as due process of law. Columbo v. Fer sylvania Public Utility Commission, 159 Pa. Super. 1:3, 48 A.2d 59 (1946); Ihrke v. Northern States Power D., 459 F.2d at 569; Palmer v. Columbia Gas, 479 F.2d at 165; Davis v. Weir, 328 F.Supp. at 321; Stanord v. Gas Service Co., 346 F. Supp. at 722; Bronson v. Consolidated Edison Co.; 350 F. Supp. at 446.

It is clear that Metropolitan Edison falls within the public function index of action under color of law. The Commonwealth of Pennsylvania has assumed responsibility for provision of electric utility service. It has granted a certificate of convenience to Metropolitan which requires the corporation to serve a clear public purpose. It subjects the corporation to extensive regulation and requires compliance with a statutory standard of reasonableness. It has designated Metropolitan Edison as its exclusive agent in York County and requires the corporation to serve 300,000 residents in behalf of the Commonwealth.

C. A Comprehensive Analysis Demonstrates Activa

This multi dimensional analysis demonstrates the substantial participation, relation, and involvement of the Commonwealth of Pennsylvania in the challenged provides of Metropolitan Edison. Every recognized index of state action is satisfied in substantial fashion by an interestate action is satisfied in substantial fashion by an interestate and joint venture which is born of monopoly pervasive regulation, and the specific authorization of Tariff No. 41. These are bolstered by mutual economic of vantage to the corporation and the state as well as by the corporation's engagement in a public function for the public benefit and in behalf of the Commonwealth.

The conclusion which follows from this collective assessment in inescapable. Metropolitan Edison is not a private business in the ordinary sense. It is joined with government to carry out a public purpose. It acts under color of law and is therefore held to the mandate of deeprocess of law in the termination of residential utility service.

III. A UTILITY CORPORATION WHICH TERMINATES RESIDENTIAL UTILITY SERVICE UNDER COLOR OF LAW IS REQUIRED BY THE FOURTEENTH AMENDMENT TO PROVIDE NOTICE AND OPPORTUNITY FOR IMPARTIAL EVIDENTIARY HEARING PRIOR TO TERMINATION

As noted at Part I, the purpose of this litigation is to attain practical due process safeguards for those consumers who face erroneous, mistaken, or arbitrary denial of residential utility service. This is nothing more than implementation of our historic commitment to fundamental fairness and the rule of law; it follows from recognition of residential utility service as a protected property interest which is subject to those procedural safeguards mandated for entitlements to necessities of life.

and to make practical implementation of this mandate, tricus advocates a substantive, pretermination notice ruirement coupled with a right to informal company wiew of disputed issues and a right to impartial review after the regulatory agency.

A. Utility Service Is A Property Interest And Entitlement To A Necessity Of Life Emcompassed Within The Fourteenth Amendment's Protection

[Due process], unlike some legal rules is not a technical conception with a fixed content unrelated to time, place, and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1950) [Frankfurter, J., concurring].

Recognizing that much of the wealth in this nation takes the form of government granted entitlements, this Court has rejected a narrow application of due process. While noting that subsidies, broadcast licenses, utility ertificates of convenience, tax exemptions, public assistance, and unemployment compensation do not fall within traditional common law concepts of property, the Court has nevertheless applied Fourteenth Amendment protection to all such interests. See generally Goldberg v. Kelly, 397 U.S. 254, 262, n.8 (1970); Bell v. Burson, 402 U.S. 535 (1971).

The Fourteenth Amendment's protection of "property", however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to any significant property interest, *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971), including statu-

tory entitlements. Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

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Residential utility service is within this broad protes tion. In the first instance, it is a necessity of high, fixed cost which cannot be deferred. See the report of the Washington Center for Metropolitan Studies, Let Then Freeze In The Dark (1974) 7-8, where it is noted that poor families pay in excess of 7% of income for utility services while upper income families pay as much as 2 Where such a large part of income must be paid for a necessary service, it cannot be denied that a significant property is at issue. Moreover, utility service is an extitlement required by the Commonwealth to be provided to all consumers, subject only to reasonable, nondiscriminatory regulations governing eligibility and payment 66 P.S. §§ 1123, 1171, 1172. Like public assistance, ::censes, or certificates of convenience, it is a property interest subject to the Fourteenth Amendment and has been so recognized by federal courts. See, for example Palmer v. Columbia Gas, 342 F. Supp. at 244, 479 F.2: at 165; Stanford v. Gas Service Co., 346 F. Supp. at 719: Bronson v. Consolidated Edison Co., 350 F. Supp. at 447. As such, residential utility service cannot be terminated without due process of law.

B. Due Process Of Law Requires Notice And Opportunity To Contest Prior To Termination Of Utility Service

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right they must be notified." Baldwin v. Hale, 68 U.S. 233 If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. Fuentes v. Shevin, 407 U.S. at 80.

this definitive declaration affirms the basic principle due process of law requires prior notice and oppority to be heard. Time and again, this rule has been ed and applied to all significant property interests, ther characterized as traditional property forms or enements. "[I]t needs no extended argument to cone that absent notice and a prior hearing . . . this judgment . . . procedure violates the fundamental ciples of due process." Sniadach v. Family Finance p., 395 U.S. 337, 341, 342 (1969). "[O]nly a premination evidentiary hearing provides that recipient procedural due process." Goldberg v. Kelly, 397 U.S. 39. "[The] root requirement [of due process ::] that individual be given an opportunity for a hearing re he is deprived of any significant property interest ." Boddie v. Connecticut, 401 U.S. at 379.

o the extent that entitlement to utility service is a ificant property interest, therefore, this Court's decise clearly require notice and opportunity to contest r to termination.

[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occured. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Fuentes v. Shevin, 407 U.S. at 82.

eaching a contrary conclusion on the question of the stance of due process, the court of appeals has legitied a pay now—sue later remedy, citing Flora v. U.S., U.S. 145 (1960) as its authority. That decision, ever, is inapposite because it involves tax collection, atter frequently recognized as within the extraordinsituation exception to the prior hearing rule. Fuentes, U.S. at 90-92, n.24. To apply this exception, there the a showing that summary seizure or denial of perty is directly necessary to secure an important government.

ernmental or general public interest; that there is special need for prompt action; and that the person initiating the seizure is a government officer who determines, within a narrowly drawn statute, that summary seizure or denial is justified in a subjective instance. Thus, while summary seizure may be appropriate to collect the internal revenue of the United States, it is not justified in the residential utility context where there is no important government interest to be served, no special need, and no government officer to determine the need for summary termination. And no justification was offered or attempted below. Therefore, the court of appeals' conclusion is simply error.

C. Metropolitan Edison's Termination Practice Fails The Basic Requisites Of Due Process

Metropolitan Edison's termination practice is set form in its Electric Tariff No. 41, a general statement of the corporation's unchecked right to terminate residential unity service upon its allegation of nonpayment and after "reasonable notice. This Tariff provides no procedural safeguards to the communer, yet it has been justified by the court of appeals as consistent with a pay now—sure later approach to due process of law. Jackson, 483 F.22 at 763. It requires little inquiry to conclude that Tariff No. 41 Green not meet the basic requisites of due process.

The termination practice absolutely fails due process is that there is no notice of the right to contest. While the utility does give notice of its intention to terminate service, that notice is but a threat and no notice whatsoever is the sense of due process of law. Mullane v. Hanover Bank and Trust Co., 339 U.S. 306, 315 (1949); Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

The company's shut-off notice does not provide the customer with the information he needs to quickly and intelligently take available steps to prevent the

threatened termination of service. No mention is made in the notice of the fact that a dispute concerning the amount due might be resolved through discussion with representatives of the company.... The single reference to making "satisfactory arrangements" cannot be construed as informing a customer of his right to continued service pending a hearing if he disputes the accuracy of the bill or the propriety of the shut-off notice. [T]he notice does not inform the customer of any rights whatever. In short, the company's termination notice is, in the context of constitutional law, virtually no notice at all. "But when notice is a person's due, process which is a mere gesture is not due process." Mullane, 339 U.S. at 315. Palmer v. Columbia Gas, 479 F.2d at 166.

The termination practice further fails due process in there is no prior opportunity to contest of which the apporation might give notice in the first instance.

Although there appears to be an inhouse investigative process for review of consumer complaints, it is so internal that consumers are not notified of its existence. Nor are Metropolitan Edison's collections employees required to refer disputed issues to this review process. Nor are consumers afforded an opportunity to participate the investigation. And in no case does the consumer have a right to this review, limited though it is. Morewer, the consumer has no right to continued service pending the review.

In short, Metropolitan Edison's termination practice mannet comport with the most elementary notion of due process of law. It is a practice which is governed by a singular concern for protection of assets, which is premied upon a patronizing benevolence, which assumes the tensumer's liability, and which ignores the rule of fundamental fairness. That is not due process of law.

CONCLUSION

Amicus urges that the judgment of the court of appeals is error. Metropolitan Edison acts under color of law and should be held to the mandate of the Fourteenth Amendment. The decision below should be reversed.

Respectfully submitted,

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26 April 1974

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Supreme Court, U. S. FILED

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IN THE

Supreme Court of The United States

October Term, 1974 No. 73-5845

CATHERINE JACKSON,
On Behalf of Herself and All Others Similarly Situated,
Petitioner,

vs.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether a complaint which seeks to enjoin the nation by Respondent of electric service to premises by the complainant fails to state a cause of action 42 U.S.C. § 1983 when Respondent's customer nother person (not related to complainant) who to paid previous bills for service and who no longer iced such premises.

Whether the termination of electric service by vestor-owned electric utility pursuant to its own and without express authorization by any State y constitutes action taken under color of State law the purposes of the Fourteenth Amendment and 42. § 1983.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

two respects, it is necessary to supplement Petitioner's ment of the case:

Petitioner states that she has been a "a residential y customer of Respondent Metropolitan Edison Comsince March 1969 ***".

mer of Respondent from March 1969 until September 970, when "the electric was disconnected in my name" of 22-23); that, on September 22, 1970, she went out to a telephone call to Respondent to inquire about the nunction and had been advised that service had been nected for non-payment (App. 24); that when she made the formulation of the telephone call to Respondent to inquire about the nunction and had been advised that service had been nected for non-payment (App. 24); that when she turned to ack on and that thereafter bills for service treed coming in James Dodson's name" (App. 23-24);

that she had no knowledge of whether the bills in the name of Dodson were ever paid (App. 24) but that she assumed that he had made such payments (App. 32); that Dodson had resided in Petitioner's house from March 1969 until August 1971 but was neither a co-owner or tenant (App. 26); that, Juring the period September 22, 1970 through October 11, 1971, Respondent had not paid any bill for electricity consumed in her home (App. 29); that, on October 6, 1971 she advised Respondent's representative who was seeking Dodson that Dodson "didn't live there any more" (App. 25); that, on October 7, 197, another representative of Respondent advised her that somebody had "crossed some kind of line" (App. 27) but she had no knowledge that this had occurred (App. 27) and that "he would have to go back to the company and find out just what was going on and just what was what" (App. 27); that, in that same conversation with Respondent's representative, she had stated that service should be "put in the name of a Robert Jackson", who was her 12-year-old son (App. 29-30) and that electric service to her resid , had been terminated on October 11, 1971 (App. 26).

2. Petitioner is a field that she had received no written or stal notice prior to the October 11, 1971 termination of ervice. The District Court made no finding as to whether is not notice had been given. However, as the Court of Appeals observed, Respondent's tariff provides, in fact, that "reasonable notice must be given before termination", that no issue is presented to this Court concerning a restomer's right to reasonable prior notice.

SUMMARY OF ARGUMENT

I. Although the point was not raised below in support of suppondent's motion to dismiss Petitioner's complaint for filure to state a cause of action as to which relief can be traited, Respondent wishes to note that the service, the

termination (for nonpayment) of which Petitioner seeks to prevent, was not being rendered to her and had not been rendered to her for more than a year. Even assuming that the Fourteenth Amendment requires that an investor-owned electric company must afford a customer opportunity for a hearing prior to the termination of service, Respondent would not be required to afford Petitioner a hearing because Respondent's customer was a person unrelated to Petitioner who occupied the same premises. It was that individual to whom the unpaid bills were sent, Petitioner not being on Respondent's customer list and even now denying liability therefor. Because she was not Respondent's customer, Petitioner has failed to state a cause of action in alleging that Respondent proposes to terminate exercic service to her premises.

II. In terminating electric service, Respondent did not act under color of State law. Respondent is an investor-owned electric utility supplying electric service in parts of Pennsylvania, a service which has never been performed by the Commonwealth for all of its residents. Respondent is subject to regulation by the Pennsylvania Public Utility Commission. But the fact that Respondent's services are beneficial to society is not sufficient to characterize the performance of those services as the carrying on of a state function. To do so would obliterate the fundamental difference between State and private action envisioned by the Fourteenth Amendment. (Similarly the fact that Respondent is subject to taxation by the Commonwealth does not transform Respondent into a "partner" of the Commonwealth or impute Respondent's acts to the Commonwealth.)

Nor does Respondent's substantial monopoly position of its operation under the supervision of the Pennsylvania Public Utility Commission convert its acts into the acts of the Commonwealth. Such a conversion requires the explicit authorization or approval of the Public Utility Commission of the acts contemplated and no such specific authorization or approval was granted. Furthermore, the pattern of Federal regulation to which Respondent is subject—which pattern exempts activities of States and their agencies—is clearly incompatible with the notion that the acts of Respondent constitute the acts of the Commonwealth.

Neither do Respondent's rules and regulations constitute the effectuation by the Commonwealth of a state policy repugnant to the Constitution, for Respondent's policies and practices with respect to termination of service are necouraged by the State. Indeed, the State has evidenced no interest in their formulation or execution.

Acceptance of Petitioner's claim for relief would effectively constitute a taking of Respondent's property in riolation of the Fifth Amendment of the Constitution. Requiring Respondent to continue to furnish electric service to customers without reasonable assurance of payment would result in Respondent's being forced to provide such service without being compensated therefor and in its being deprived of property without due process of law.

ARGUMENT

1. Petitioner's complaint fails to state a cause of stion upon which relief may be granted because termination of service to which her complaint is directed to not service to her.

This case is one of many in which plaintiffs have sought the establish that the termination of the service rendered to electric, gas and telephone utilities, without prior hearness, violates the Fourteenth Amendment of the United

States Constitution¹ and 42 U.S.C. §1983.² Such claims have been passed upon, with conflicting results, by United States District Courts in Districts in Colorado³, Connecticut⁴, Kansas⁵, and New York⁶, and by United States Courts of Appeals in the Third⁷, Sixth⁸, Seventh⁸, and Eighth¹⁹, Circuits; similar claims are pending in other courts.

¹ Section 1 of the Fourteenth Amendment provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

² 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured is an action at law, suit in equity, or other proper proceedings for redress." The "under color of" state law requirement of 42 U.S.C. § 1983 and the "state action" requirement of the Fourteenth Amendment have been construed to be of the same breadth and scope. United States v. Price, 383 U.S. 787, 794 n. 7 (1965).

³ Hattell v. Public Service Co., 350 F.Supp. 240 (D. Colo. 1972)

^{*} Salisbury v. Southern New England Telephone Co., 35 F.Supp. 1023 (D. Conn. 1973).

⁵ Stanford v. Gas Service Co., 346 F.Supp. 717 (D. Kans. 1972).

⁶ Bronson v. Consolidated Edison Co., 350 F.Supp. 443 (SD N.Y. 1972).

⁷ Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3rd Ca 1973).

⁸ Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153 (6th Cz 1973).

⁶ Kadlec v. Illinois Bell Telephone Co., 407 F.2d 624 (7th Cirt. denied, 396 U.S. 846 (1969); Lucas v. Wisconsin Electropower Co., 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 114 (1973).

¹⁰ Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. vacated as moot, 409 U.S. 815 (1972); Palmer v. Columbia Gas & Ohio, Inc., 479 F.2d 153 (6th Cir. 1973).

In view of the extensive litigation with respect to this issue, and the attention it has received from legal commentators¹¹, it is with some diffidence that Respondent brings to the attention of the Court its view that the termination of electric service to which Petitioner's complaint is addressed could not have deprived her company Constitionally-protected right since that termination was not of service to her.

Although Respondent did not rely on this ground in support of its motion before the District Court to dismiss the complaint for failure to state—cause of action, it is well settled that, if the result below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason. Helvering v. Gowran, 302 U.S. 238, 245, rehearing denied, 302 U.S. 781 (1937); Helvering v. Kankin, 295 U.S. 123, 132-33 (1935).

If an issue has been properly raised in the court or courts below (and Respondent in this case has raised the Petitioner's failure to state a cause of action in its motion to dismiss), an appellee may, without taking a cross appeal, arge in support of the judgment below any matter appearing in the record even though such matter was overlooked or ignored by the court below, so long as the appellee does not work to enlarge his own rights or lessen the rights of his alversary under the decree. Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 191, rehearing denied, 200 U.S. 687 (1937); Langues v. Green, 282 U.S. 531, 535 t. seq. (1931); United States v. American Railway Express Co., 265 U.S. 425, 435 (1924). (Since the decree below merely stanted Respondent's motion and dismissed Petitioner's complaint, there is no question of enlarging Respondent's

[&]quot;See, for example, Shelton, "Shutoff of Uthity Services for No. Payment; A Plight of the Poor", 46 Wash. L. Rev. 745 (1971); "Usastitutional Safeguards for Public Utility Customers: Power the People", 48 N. Y. U. L. Rev. 493 (1973); "Fourteenth Due Process in Terminations of Utility Service for Payment", 86 Harv. L. Rev. 1477 (1973); "Public Utilities the Poor", 78 Yale L. J. 48 (1969).

rights or lessening Petitioner's rights under the decree. In the light of the recent decisions of the Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) and DeFunit v. Odegaard, 42 U.S. L.W. 4578 (U.S. April 23, 1974) which, in effect, caution against the rush to reach Constitutional confrontations not necessarily involved by the fact of the particular case presented to the Court, Respondent feels compelled to note its view that, no matter how broadly one construes "property interests" and "state action" Petitioner's complaint and testimony demonstrate that she had no Constitutionally-protected right to receive electric service from Respondent.

By her own testimony Petitioner had ceased to be a cus tomer of Respondent on September 22, 1970.12 At that tim she was delinquent in the payment of bills for service, an she has never cured that delinquency. Thereafter, althoug Respondent furnished electric service to the premises owner by Petitioner for an additional 13 months and the meter with respect to such service were read regularly, Respond ent's enstomer was James Dodson who resided in Pet tioner's home until August 1971, and Petitioner acquieses in the substitution of Dodson for herself as Respondent customer. Petitioner knew that Respondent's bills we rendered to Dodson and not to herself and she had no know edge as to whether such bills were ever paid by Dodso Although Dodson ceased to reside in Petitioner's house August 1971, she made no effort to establish service in h own name. Indeed, when Respondent's representative car to her house on October 6, 1971 inquiring for Dodson, s stated that service should be "put in the name of Robe Jackson", her 12-year-old son.

Pending the outcome of these proceedings, Respondent furnishing electric services to the premises, pursuant to

¹² Petitioner's complaint in the District Court (App. 9) a brief in this Court (Pet. Br. 4) make clear that Petitioner's explaint was directed to the October 11, 1971 termination and not the September 22, 1970 termination.

terms of a temporary restraining order of the District Court (App. 13) and of an Order of the District Court continuing the temporary restraining order (App. 75). Respondent has not billed Petitioner for service rendered under such orders and Petitioner has not paid for such service.

Petitioner's own complaint contains an implicit disavowal that she was a customer of Respondent for a period of a year prior to the allegedly wrongful termination of service on October 11, 1971, to bich her complaint is addressed, for her complaint states in paragraph 9 that:

"The billing party or person responsible for said bill, since on or about October 1970, has been and is one James Dodson, a former co-occupant with Plaintiff, of the above premises."

In her statement of questions presented and frequently throughout her brief, Petitioner refers to non-payment of a "disputed bill" (e.g., Pet. Br. 3, 4, 7), but the record does not disclose that she was disputing her own unpaid bill for service rendered prior to September 22, 1970. Similarly, while in her complaint she states that she has "an adequate defense to her alleged liability of the utility bill" (App. 10), the only defense to such liability which the presented was that Dodson "had assumed full liability for such payment". 13

Accepting, arguendo, Petitioner's contention that the termination of electric service to a customer by an investor-exact utility without prior opportunity for a hearing is within the Constitutional proscription of the Fourteenth Amendment and 42 U.S.C. § 1983 it is Dodson—and not retitioner—whose rights have been denied, and it is Dodson—not Petitioner—who can assert a claim of such denial. As relitioner's complaint disavows responsibility for payment

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is In her brief in this Court, Petitioner states that Dodson "had working full responsibility for payment" (Pet. Br. 4).

of Respondent's bills to Dodson, Petitioner is compelled to assert in substance that it is the premises that she owns that are entitled to electric service from Respondent. But the protection of the Fourteenth Amendment applies to "persons" and not "premises".

Nor can Petitioner successfully contend that she became Respondent's customer on October 7, 1971, after Respondent learned the previous day that Dolson no longer resided in the previous. Instead, Petitioner's own testimony on that score is that Respondent's representative stated that he would have to go back to the Company and find out what was going on and that she had told him that electric service should be put in the name of Robert Jackson, her 12-year old son. There is no evidence that she had requested that service be furnished to her or that either she or her 12-year old son had in fact been accepted by Respondent as Respondent's customer.

In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court he that a State may not, without prior hearing, terminate the payment of welfare benefits to one who has been receiving such payments. It did not there hold that a State is con pelled to initiate such payments before being satisfied the the claimant is entitled to receive them and Justice Blac in dissent, urged that one consequence of the majority holding was that, in order to protect itself against improp claims, a State would be likely to be more rigorous in i investigations before initiating such payments. Id. at 27 79. If a State is not constitutionally compelled to initia welfare payments to a claimant before being satisfied the the claimant is entitled to such payments, it is difficult believe that an investor-owned electric utility is constitution tionally compelled to furnish electric service to a potent applicant for such service (let alone to her minor son) w has not complied with Respondent's regulations relating the initiation of such service, merely because she is seek such service for the same premises as those previously a ecupied by another (delinquent) customer to whom service ras previously rendered by the utility.

Petitioner's complaint was filed not only on her own shalf but also as a class action. By reason of the fact that he was not, and for more than a year had not been, a restomer of Respondent, it may be doubted whether, if the issue had been presented to the District Court for decision, that Court would have found Petitioner to be an adequate apresentative of the alleged class. But that matter is not before this Court. The District Court never made a class which determination. Consequently, Petitioner's own lack of any Constitutionally-protected interest with its attendant bek of jurisdiction cannot be cured on this review by the class action allegations which were not decided by the Courts below.

II. In adopting and filing with the Pennsylvania Public Utility Commission its general rules and regulations and in Aministering such general rules and regulations, Respondent did not "act under color of state hw".

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A. The furnishing of electric service is not, and has ever been, a function performed by the Commonwealth of Pennsylvania for all of its residents.

It has been repeatedly held that the commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority, that the Fourteenth Amendment "erects no shield again there's private conduct, however discriminatory or wrongful", and that the reach of 42 U.S.C. § 1983 is of similarly limited scope. District of Columbia v. Carter, 409 U.S. 418, 423-24 (1973). In apparent deference to its recognition of this well-established proposition, Petitioner first characterizes the role irrformed by Respondent as the discharge of a "public functions", then equates the discharge of "public functions".

to "State action", and finally concludes therefrom that the acts of Respondent are the acts of the Commonwealth But this proposition does not withstand analysis.

There is no question that Respondent discharges a function which is subject to licensing, regulation and other control by the State and which, in many contexts, can accurately be described as "public functions". So, too, at the functions performed by innkeepers, grain storage elevators, warehousemen and many other forms of economic activity. But the fact that the State has the power to licens and regulate the acts of a private person does not convers such acts to State ation. In conducting its business, Respondent is not discharging a function that has ever been a function of the Commonwealth of Pennsylvania.

Respondent and its predecessors were organized under the provisions of the Corporation Act of 187414, which ant dated by almost a half century the enactment in 1913 of the first comprehensive public utility regulatory statute, the Pennsylvania Public Service Company Law. 15 When R spondent and its predecessors were organized, the gree majority of the residents of the Commonwealth did not re ceive electric service. Indeed, throughout the Nation, the history of electric service has been one of the gradual extern sion of electric service from urban clusters to more remove areas as population has grown and technology has change Even today, there are a relatively few residents of the Con monwealth who do not receive electric service and the Commonwealth has not assemed any responsibility to pr vide such service to them. Thus, in the supply of elec' service, Respondent has not assumed a responsibility of the Commonwealth and is not acting for the Commonwealth furnishing such service.

The fact that some boroughs in Pennsylvania have elected to undertake the distribution of electric service pursuant Pennsylvania Third Class City Code (53 P.S. § 38575) do

¹⁴ 15 P.S. §§ 3001, 3014.

¹⁵ Act 1913, July 26, P.L. 1374.

not elevate the furnishing of electric service to a State function. Instead, it reinforces the proposition that the Commonwealth has not undertaken responsibility for the furnishing of electric service to all its residents, that it merely permits its boroughs to assume such responsibility if their local officials and electorates wish them to do so. But functions performed by private parties do not become State functions because they are occasionally performed by States or local municipal bodies.

Almost a century ago, the Pennsylvania Supreme Court rejected the argument that the furnishing of water and gas constituted a State function. Girard Life Insurance Co. v. The City of Philadelphia, 88 Pa. 393 (1879). This view was reiterated by the Pennsylvania Supreme Court in Baily v. Philadelphia, 184 Pa. 594, 39 A. 494 (1898), in which the Court held that even the furnishing of street lighting was not a municipal duty. 16

By contrast, there are functions which, by tradition, the State constitution or State legislation are State functions. Among those are the furnishing of free education¹⁷, police protection, the conduct of elections, etc. When the State delegates the performance of such functions to a private party, the action of the private party in conducting such functions is state action, as the Court held in Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), Evans v. Newton, 382 U.S. 296 (1966), Cooper v. Jaron. 358 U.S. 1 (1958), Terry v. Adams, 345 U.S. 461 (1953), Marsh v. Alabama, 326 U.S. 501 (1946), Smith v. Allwright, 321 U.S. 649 (1944) and Vixon v. Condon, 286 U.S. 73 (1932).

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the Cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 where in support of the position that a private corporation does not act under color of State law merely because it may be the beneficiary of State supplied services such as police and fire protection, or the providing of water or electricity, the Court states that such a holding would "utterly emasculate the distinction between private and state conduct".

This has been required by the Pennsylvania Constitution since 1790. See Pa. Const. of 1790, art. 7, § 1 (53 P.S. § 47471).

B. The fact that Respondent's activities benefit its cus tomers and are subject to regulation does not convert such activities into State action.

It has been suggested that where "significant state in terests are promoted through particular conduct, then the ostensibly private party comes under color of law and within the ambit of the Fourteenth Amendment" (Brie for the Legal Aid Foundation of Long Beach et al. as Amicu Curiae at 21). The test proposed is an appealing one but, i accepted, would bring within the ambit of the Fourteent Amendment a whole variety of actions universally con sidered to be without it. For example, assuming the promo tion of the public health to be a "significant state interest," would not the application of this formula mean that doctors because of their being permitted to practice solely by virtue of being licensed from the State, be subjected to precisely the same restraints on billing and termination of services as amici propose for electric utilities? Would not the same be true of optometrists and hairdressers? Again, would not laws regulating the ingredients of food items bring al vendors of such products "within the ambit of the Fourteenth Amendment"? Any licensing or regulatory system is predicated upon the concept that the public interest is affected by the acts of those subject to such licensing of regulation. At issue is whether the promotion of "significant state interest" by the grant of a license or imposition of regulation auto natically subjects individuals so licensed or regulated to restrictions similar to those placed upon State government itself. We submit that such a result effectively destroys the distinction between private and public action which has been fundamental to the operation of the Fourteenth Amendment since its adoption. For that reason amici's test must be rejected.

C. The fact that Respondent has a substantial monopoly of electric service within its service area and operates as a public utility under the authority of the Pennsylvania Public Utility Law does not convert its acts into the acts of

the Commonwealth unless and until such acts are specifically authorized or approved by a Commonwealth agency.

Petitioner has stated as fact that Respondent is a "state sanctioned monopoly" (e.g. Pet. Br. 7, 13), possesses an "exclusive franchise" (e.g. Pet. Br. 7) or "exclusive territory" (e.g. Pet. Br. 24) and enjoys a "guaranteed fair rate of return" (e.g. Pet. F. 24). Respondent might well appreciate these attributes if they were true, but they are not. While Respondent does, in fact, have a substantial monopoly in its service area, Respondent's certificate of public convenience does not give it the exclusive right to furnish electric service in its service area. In certain parts of its service area another investor-owned utility also has a certificate of public convenience to furnish service and customers have from time to time elected to change their supplier of electric service.

Furthermore several boroughs within Respondent's service area themselves furnish electrical service to their residents, and a rural electric cooperative does the same for its members. Petitioner's own City of York could itself compete with Petitioner by purchasing electricity at wholesale and retailing it to its residents.

Thus the Respondent does not exercise a State-granted exclusive monopoly as Petitioner alleges. Moreover, the fact that a public utility possesses a substantial monopoly pursuant to governmental authorization does not in and of itself make the acts of the public atility those of the government. Public Utilities Commission v. Pollak, 343 U.S. 451, 462 (1952). Nor is the mere existence of authority to regulate sufficient to convert private action to State action. There must be a closer nexus; the act complained of must have been specifically authorized in some fashion by the State agency. Public Utilities Commission v. Pollak, *zpra; Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

State regulation does not, of course, provide a "guaranted fair rate of return" as alleged by Petitioner. One

need only look at the history of railroads and street rail ways to discern that rate regulation provides no such umbrella. Indeed, under the inflationary conditions existing during the past several years, Respondent, like many other electric utilities, has been unable to earn a fair rate of return, largely by reason of the inhibitions of the rate regulatory process on its attempts to price its service of a compensatory basis.

In our view, the decision of the Pennsylvania Supreme Court in the *Girard Life* case¹⁸ demonstrated astounding foresight in recognizing, in 1879, that a municipality could not arbitrarily discontinue water or gas service to one to whom it had previously furnished such service, not because the furnishing of such service was a municipal function but because it would be a State agency (i.e., municipality) that was acting arbitrarily in so doing, even though the service that it had provided was not a state function.¹⁹

D. The fact that Respondent's activities are subject to extensive regulation under Federal statutes and by Federal agencies is incompatible with the concept that its status as public utility subject to regulation by the Commonwealth makes its acts those of the Commonwealth.

A catalogue of the Federal statutes, regulations and agencies to which Respondent is subject would be almost endless. For example, it is subject to regulation by the Federal Power Commission under Parts II and III of the Fed-

^{18 88} Pa. 393 (1879).

life. If she is thereby suggesting that the right to receive electrical service should constitute a property right or a privilege of the citizens of the United States, she should deal with the analyquestions of whether providing such service may be conditioned upon payment therefor. If her argument that the providing of electricity constitutes a 'public function' means only that is provision by governmental entities has been so commonplace that the has taken on the coloration of a right or privilege, experience of the past eight of years, during which the overwhelming proportion electric service has been provided by investor-owned companies, sufficient disproof.

eral Power Act²⁰ and, as a subsidiary of a registered public stility holding company, by the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935.²¹ Both of these statutes are not applicable to States or State agencies.²² If, as Petitioner contends, action by the Commonwealth in granting of certificates of public convenience to Respondent and subjecting it to comprehensive regulatory authority makes Respondent's acts those of the State, then the same reasoning should make Respondent an agency of the Commonwealth for purposes of exemption from Parts II and III of the Federal Power Act and the Public Utility Holding Company Act of 1935—which is clearly not the case.

In Otter Tail Power Company v. United States, 409 U.S. \$20 (1973), the Court held that an electric utility company was in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). Since the Sherman Act does not apply to States and State agencies, that holding cannot be reconciled with Petitioner's argument that all acts of a public utility which possesses State-granted franchise rights and is subject to comprehensive regulation by a State agency are ipso facto the acts of a State.

The "sifting of facts and weighing of circumstances" approach employed by the Court for in applying 42 U.S.C. 1983 obviously means that a meat axe cannot be employed as Petitioner would have the Court do. What is required is cateful diagnosis and the use of a surgeon's skill and scalpel

^{™ 16} U.S.C. § 824(a) et seq.

^{21 15} U.S.C. § 79 et seq.

Section 201(f) of the Federal Power Act (16 U.S.C. § 824(f)) provides in pertinent part:

[&]quot;No provision in [this Part] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

Section 2(c) of the Public Utility Holding Company Act (15 S.C. § 79b(c)) is essentially similar.

to lay bare whether a particular act is designed to effectuate a State policy repugnant to the Fourteenth Amendment or is otherwise pursuant to clear State authorization.

E. The rules and regulations of Respondent and its administration thereof do not constitute the effectuation by the Commonwealth, directly or indirectly, of State policies which are repugnant to the United States Constitution.

Most of the cases presenting "State action" issues to this Court have represented attempts to perpetuate, through purportedly private instrumentalities, the prior racial discriminatory State policies which were the cause of adoption of the Fourteenth Amendment to the Constitution.

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) involved the use of restaurant facilities owned by a State agency and leased to an allegedly private entity-but on terms which made the State agency a joint participant with the private entity-to discriminate against customers on the grounds of race. Peterson v. City of Greenville, 373 U.S. 244 (1963), involved segregation by a private entity at its lunch counter pursuant to local city ordinances requiring the separation of races in restaurants. Lombard v. Louisiana, 373 U.S. 267 (1963) involved racial segregation by a private entity where public statements by the Superintendent of Police and Mayor were viewed by the Court as equivalent to the city ordinance in Peterson. Robinson v. Florida, 357 U.S. 153 (1967) involved racial segregation by a private entity pursuant to the requirements of a State regulators agency. Reitman v. Mulkey, 387 U.S. 369 (1967) involved legislation enacted pursuant to a citizens' initiative which had the effect of expressly authorizing racial discrimination in housing, and which the California Supreme Court believed would significantly encourage and involve the State in private discrimination. Evans v. Newton, 382 U.S. 296 (1966). involved an attempt to perpetuate racial discrimination in \$ park which for years had been operated and maintained by the City of Macon, Georgia as trustee on a racially discriminatory basis, through the substitution of new trustees for the City.

In District of Columbia v. Carter, 409 U.S. 418 (1973), Justice Brennan reviewed on behalf of a unanimous Court the derivation of 42 U.S.C. § 1983 from Section 1 of the Ku Klux Klan Act of 187123. In holding that 42 U.S.C. § 1983 does not apply to the District of Columbia, he emphasized that "[a]ny analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted" (409 U.S. at 425) and that the remedy created by this Section was "against those who representing a State in some capacity were unable or unwilling to enforce a State law" (409 U.S. at 426); Monroe v. Pape, 365 U.S. 167, 175-76 (1961). The terms of the Act reflected an early expectation that a State might attempt to perpetuate racial discrimination in multiform ways-or by "statute, ordinance, regulation, custom or usage". The history of racial discrimination since the adoption of the Fourteenth and Fifteenth Amendments, and the almost infinite number of forms and devices resorted to in an attempt to perpetuate prior traditions of racial discrimination have borne out this expectation. It is in this context that the "sifting of facts and weighing of circumstances" approach has been employed by the Court to reach the substance, rather than the form, employed for that purpose, and, most important to this case, to ascertain whether there is a nexus between (a) the State's relationship to the private entity and (b) the act of the private entity to which the complaint is directed. Thus, even though Moose Lodge No. 107 v. Irvis, \$67 U.S. 163 (1972) also involved racial discrimination, the Court found that there was no nexus between the granting by the State of a license to serve liquor and the practice of racial discrimination by the licensee. The Court pointed out that, with one exception, no Pennsylvania statute governing Equor licensing "either overtly or covertly" encouraged discrimination24 and that, therefore, there was no Statecommanded result. The Court also pointed out that the State's liquor licensing "is nothing approaching the symbi-

n Act of April 20, 1871, 17 Stat. 13

^{14 407} U.S. at 173.

otic relationship between the lessor and lessee that was present in Burton."25

There is a point at which verbal formulations to describe sophisticated attempts to achieve forbidden conduct run into difficulty. Formulations in terms of "state-commanded result", "symbiotic relationship", "significant involvement" of the State and the like are admirable in terms of their flexibility to reach and proscribe conduct, no matter how concealed or verbalized, which is contrary to the comprehensive protection of the Fourteenth Amendment. By the same token, such formulations should not be applied to acts which are privately initiated and executed and are neither fostered nor encouraged, let alone required, by "statute, ordinance, regulation, custom or usage".

By contrast with these cases involving discrimination on account of race, nothing in the Pennsylvania Constitution, statutes, or regulations commanded or approved action by Respondent to terminate electric service to a customer for non-payment of bills for service previously rendered to him. The Pennsylvania Constitution does not deal with the matter at all. Section 401 of the Pennsylvania Public Utility Law (66 P.S. § 1171) requires a public utility to "furnish and maintain adequate, efficient, safe and reasonable service" which shall "be reasonably continuous and without unreasonable interruptions or delays". That same section also provides in part that "subject to the provisions of this Act and the regulations or orders of the Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service."

The non-intervention of the State, and expressly of the Pennsylvania Public Utility Commission, in the discontinuance of service for non-payment of bills is reinforced by the provisions of subsection 202(d) of the Pennsylvania

^{25 407} U.S. at 175.

Public Utility Law (66 P.S. 9 .22). That subsection provides:

"Upon approval of the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful: ***

"(d) For any public utility to dissolve, or to abandon or surrender, in whole or in part, any s vice, right, power, franchise, or privilege: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron."

Section 302 of the Pennsylvania Public Utility Law (66 P.S. § 1142) requires a public utility to file with the Commission within such time and in such form as the Commission may designate, tariffs showing all rates established by it and to keep copies of such tariffs open to public inspection. Sections 304 and 402 (66 P.S. §§ 1144 and 1172) prohibit a public utility, in respect of both rates and wire, from granting any unreasonable preference or advantage to any person or from subjecting any person to any unreasonable prejudice or disadvantage. Thus, if Petitioner is correct in her contention that the termination of utility service to indigent customers subjects such customers, solely by reason of indigency, to unreasonable rejudice or disadvantage, the Commonwealth has not reclored such action; on the contrary it has forbidden it.

Other sections of the Pennsylvania Public Utility Law eve the Commission broad authority to regulate many spects of Respondent's operations. For example, if the Commission finds that the service of a public utility is a treasonable or unreasonably discriminatory, the Commission is directed to prescribe, by regulation or order, fasonable and adequate service. (Section 413, 66 P.S. 1183). It is also authorized to prescribe adequate and

reasonable standards, regulations and practices to be observed by public utilities. (Section 412, 66 P.S. § 1182). The Commission has general administrative power and authority to supervise all public utilities doing business within the Commonwealth (Section 901, 66 P.S. § 1341) and to enforce the Act by its regulations and orders (Section 902, 66 P.S. § 1342).

Up to this date, the Pennsylvania Commission has taken no action either to approve or disapprove explicitly Respondent's termination rule. Petitioner's brief explicitly confirms this in stating that the Pennsylvania Commission has specifically refused to promulgate additional rules and regulations regarding utility company collection and termination practices and dismissed, on March 20, 1974, the petition of several low income consumers (including that of Petitioner) to institute rule-making proceedings on that subject.²⁶

The only action taken by the Commission thus far is reflected in its Tariff Regulation VIII, which provides:

"Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment."

On its face this Tariff Regulation of the Commission does not appear necessarily to deal with terminations of service. Rather, it appears to deal with financial penalties (e.g. interest or penalty charges) for late payments and

the Pennsylvania Commission may be subject to attack by Petitioner under 42 U.S.C. § 1983. But, if such an attack is to be made by her, it would be based on that action of the Pennsylvania Commission and not upon actions taken by Respondent.

discounts for prompt payments. But, even assuming that it embraces a penalty in the form of termination of service, the Regulation neither endorses nor disapproves of such termination.²⁷

As the District Court noted:

"However, the mere requirement that Metropolitan Edison clearly spell out any penalties it will impose for non-payment of bills does not clothe Metropolitan Edison with state authority nor transform the defendant's regulations into acts of the state. Rather, the purpose of Tariff R. VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their bills". (App. 78)

Respondent's tariff provision relating to discontinuance of service provides, in pertinent part (App. 46):

"(15)-Cause for discontinuance of service:

Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; or, without notice, for abuse, traud or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof."

Because the decision of the Court below (at App. 84) traws an inference—favorable to Respondent—concerning the genesis of this provision of Respondent's tariff which to to wholly correct, and because this inference, which is hard on the silence of the record, has also been adopted

During its current session—i.e., since the granting of the petidea for certiorari—the Pennsylvania Legislature has amended
the State's Public Utility law to prohibit the termination of elecreservice on Friday, Saturday or Sunday or on certain holidays.
If not reaching the question before the Court, it does not affect the
introner's rules and regulations regarding the manner of termitation and continues the State's policy of inaction in the area.

by Petitioner and amici, we deem it necessary to supp ment the record in this respect. Court Exhibit No. 6 filed the District Court consisted of the tariff sheets and supp ments showing the provisions of Respondent's Tariff ! 40 relating to residential electric service which were effect during the period January 1, 1970 to and includi June 29, 1971. Court Exhibit No. 7 was Responden Electric Tariff No. 41 showing the provisions of such Tar relating to residential electric service as they were effe t subsequent to June 30, 1971. Respondent's Elect Tariff No. 41 and Supplement No. 1 thereto were filed Respondent with the Pennsylvania Public Utility Comm sion on April 30, 1971. The primary purpose of filing El tric Tariff No. 41 was to provide for a proposed annual r increase of approximately \$12,600,000 and of Supplem No. 1 thereto was to provide for a further increase approximately \$10,000,000. However, in accordance w the general practice of public utilities in Pennsylvania signed to prevent tariffs from becoming under cumberso with numerous supplements and provisions, Respondent cluded in Electric Tariff No. 41 not only its new rates also all of its pre-existing general rules and regulations (A 38-63) including its Regulation No. 15 to which Petitione complaint is directed. This Regulation 15 had been in eff as part of Respondent's prior tariffs.

By Commission Order of June 28, 1971, the Pennsylva Commission suspended for six months the operation of Su rlement (thereby precluding the additional \$10,000; inc. case provided for in the Supplement), but it did suspend Electric Tariff No. 41 itself and the \$12,600; increase therein provided for was permitted to been effective June 30, 1971. However, by a concurrent of dated June 28, 1971, the Commission instituted an invegation for the purpose of determining the fairness, reas ableness, justness and lawfulness of the rates, charges, read regulations proposed in Tariff No. 41 and Supplements.

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Various complaints with respect to Electri Tariff N 12 and Supplement thereto were filed but no complaint was direct d at Regulation No. 15. Hearings were held during the period September 30, 1971 to March 10, 1972, oral argument held before the Commission and the Commission decision was rendered on August 8, 1972. No issue was presented in the proceeding with respect to Respondent's Regulation No. 15, no testimony with respect thereto was presented and to finding made thereon.

In its August 8, 1972 order, the Commission authorized increased rates aggregating approximately 76% of the total increase proposed in Electric Tariff No. 41 and the Supplement. It did not direct any changes in any of Respondent's rules or regulations. It directed Respondent to file, effective for service rendered on or after the date of the order, a further supplement containing acceptable rates to provide total annual revenues at the rate alload by its order, together with supporting calculations, and Respondent did so promptly thereafter.

It is Respondent's view that such action by the Commission does not constitute State action by the Commission or any other agency of the State with respect to the matters which are the subject of this proceeding, but we have set forth this information in order to clarify the record on this wore.

It is Respondent's view that, far from there being State wition in the case before the Court, there has been consistent State inaction. Unlike Respondent's charges for service, Remodent's Regulation regarding termination, though considered in Respondent's tariff, has never been specifically proved by the Pennsylvania Public Utility Commission.²⁸

F. Cf. Public Utilities Commission v. Pollak, 343 U.S. 451 (1952)

F. The fact that Respondent's revenues are subject taxation by the State and local subdivisions thereof does not bring Respondent's actions within the ambit of the Forteenth Amendment.

In Ihrke v. Northern States Power Co., 459 F.2d 566 Cir.), vacated as moot, 409 U.S. S15 (1972), the Eight Circuit based a finding of State action on the fact that the City which regulated the utility also received 5% of the utility's gross earnings. The Court below in this case a peared to distinguish Respondent's situation from the involved in Ihrke, without making clear its basis for sufficient (App. S6). If the holding in Ihrke is correspondent shares with Petitioner the view that Respondent's situation is indistinguishable. Respondent pays greecipts tax to the Commonwealth 29 which, through the Pennsylvania Public Utility Commission, also regular Respondent.

Respondent believes that argument thus adopted by Eighth Circuit in *Ihrke* is wrong. It proves too much.

that test, any private entity which pays any tax on graceipts or net income and whose receipts or earnings can hanced by the act complained of would be deemed to acting for the State for purposes of the Fourteenth Amement and 42 U.S.C. § 1983. Just as the receipt of Staturnished services does not "emasculate the distinction tween private as distinguished from State conduct", Mo Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972), so the penent of general taxes does not emasculate that distinction

G. Since Respondent did not employ facilities or auth ity of the Commonwealth to effect the termination of so ice, the manner of such termination is not central to finding that the termination did not involve action uncolor of State law.

The Court below laid stress on the fact the terminal was effected by Respondent without entry on Petitione

²⁹ Respondent also pays a separate gross receipts tax to the of York, Pennsylvania, where Petitioner resides.

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premises (App. 84). Although this was the fact in this case, Respondent submits that the result should have been the same if this termination had been effected on Petitioner's premises. Most electric utility terminations are effected on the customer's premises at the meter. The record is silent concerning the reason for effecting this particular termination at Respondent's pole and not on Petitioner's premises.

Respondent's terminations of service are a matter of self-help effected in accordance with its own regulations (App. 44-45); the grant of authority by its customers to Respondent of access to such premises is one of the "conditions under which service is rendered" (App. 38). Although Petitioner asserts that such access is dependent pion a grant of authority from the Pennsylvania Public Utility Commission in the latter's Rule 14D (reproduced Pet. Br. App. A. at 13a), an examination of that Rule demonstrates that it relates to access "for purposes of maintenance and operation." Respondent does not rely apon this Rule of the Commission for access to a customer's premises for termination. It relies on the terms of its own Regulations which are, as noted, a condition of its undertaking to supply service.

Termination of service by a utility with its own personnel persuant to its agreement with its customer thus stands a different footing than the use of State officials under writ of replevin as presented in Fuentes v. Shevin, 407 U.S. 67 (1972). In that case, creditors caused a State official act. In this instance no State personnel are involved.

II. The practical consequence of acceptance of Petitioner's position would be to deprive Respondent of property without due process of law in violation of the Fifth Incadment.

As set forth above, the claim that Petitioner is disputing is bill is attenuated at best. But, assuming the existence of a genuine dispute, Petitioner's claim is that she

may use the Federal courts to compel Respondent to spen its funds and property to provide service to her without payment or assurance of payment.

Petitioner and amici lay great stress on some instance of hardship suffered by consumers, but they apparent pay no attention to the heavy burden on utilities the investors and the general public caused by delinquency i payments by customers and the encouragement to suc delinquency caused by an inflexible requirement for hear ing prior to termination. In Palmer v. Columbia Gas of Ohi: Inc., 342 F. Supp. 241 (N.D. Ohio W.D. 1972), aff'd, 479 F.2 153 (6th Cir. 1973), particularly relied upon by Petitioner the Federal District Court found that the utility there is volved, which served a total of 140,000 customers, annually mailed out 120,000 to 140,000 notices of proposed termina tion, but actually discontinued service in only 6,000 instances It has been reported that some electric utilities have as many as one-third of their total customer accounts in arrears and that this has been a significant factor in the financial crisis suffered by Consolidated Edison Company of New York, Inc. 80

An inflexible requirement for a prior hearing before a impartial hearing officer (with or without appointment decounsel) would not only greatly add to the administration burden in conducting utility operations, but would greatly increase the delinquency rate and the losses suffered by utilities. The proposed termination procedures set for by amicus curiae, National Consumer Law Center, Inc. and the commentator in "Fourteenth Amendment Deprocess in Terminations of Utility Service for Non-perment" appear to ignore this aspect and assume that the costs will in some unspecified fashion be borne by a willing general public. If so, their appeal should be to the Legilature and not to the Federal Courts. It may well be these social policies they urge will be best achieved in

⁸¹ 86 Harv. L. Rev. 1477, 1494 (1973).

³⁰ New York Daily News, May 22, 1974, page 30.

revised welfare procedures in which welfare agencies would provide funding for disputed utility bills.

In the interim, one cannot assume that utilities can reover these costs. They do not have the taxing powers vailable to reimburse themselves for losses suffered and, a that respect, are in a different posture from the governzent which can be reimbursed through the exercise of axing powers for payments made to unqualified welfare acipients. Goldberg v. Kelly, 395 U.S. 254 (1970). As reviously stated, Respondent and many other utilities have in fact been unable for some time to earn the fair return which is the purported standard of rate regulation. The granting of Petitioner's complaint would accentuate his problem and produce a result in which an attempt to zist on "due process" hearings before any utility termisation deprived a great many of substantial property rights a order to protect potential property rights of a few. Due rocess requires a better balancing of competing interests and a recognition that not all problems of our society can thrust upon the courts.

CONCLUSION

For the foregoing reasons, Respondent respectfully strees that this Court affirm the action of the Court below.

Respectfully submitted,

Thomas M. Debevoise James B. Liberman

Debevoise & Liberman Shoreham Building 15th & H Streets NW Washington, D.C. 20005 (202) 393-2080 Signes Court, B. S. FILED

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supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner,

METROPOLITAN EDISON COMPANY, A Pennsylvania Corporation,

٧.

Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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4.	Respondent is a monopoly whose challenged activity herein is authorized by and promotes interests of the Commonwealth of Pennsylvania.
5.	The fact that Respondent's activities are subject to some Federal regulation is not incompatible with a finding of action under color of state law with regard to termination of service for nonpayment of a bill.
6.	Respondent's actions constitute the effectuation of state policies which are repugnant to the Constitution.
7.	The fact that Respondent's revenues are subject to the Utilities Gross Receipts Tax is one index of state action.
8.	In employing the authority of the Commonwealth to terminate Petitioner's electrical services, it is immaterial for state action purposes that the Respondent did not enter upon the Petitioner's premises.
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reme Court of the United States

OCTOBER TERM, 1974

No. 73-5845

ATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner,

V.

METROPOLITAN EDISON COMPANY, A Pennsylvania Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I.

PETITIONER HAS STANDING TO BRING THIS ACTION

A. Petitioner is entitled to bring this action because she is the Respondent's customer and is the real party in interest and the intended beneficiary and recipient of the Respondent's services.

In its first argument, Respondent raises the issue of Petitioner's legitimacy to bring this action. This issue

was not raised in the lower courts, nor was it included in Respondent's brief in opposition to the Petition for the Writ of Certiorari. Certainly, the failure of the district court and court of appeals to consider the obvious issue lends support to the apparent lack of significance of such issue.

There is no question that the Petitioner is a prores party to bring this action. Petitioner was the owner occupant and prior billing party of the premises to which Respondent's electrical services were provided (A-22). The Respondent was certainly aware of the above and provided service to the Petitioner as the beneficiary of the contract entered into between it and Dodson in September 1971. (A-23). Furthermore, after Dodson moved from the premises, the Respondent considered the Petitioner to be its customer and liab's for the bill, as shown by the demand made by the Respondent's employee for \$30.00 by the following Monday on October 11, 1971 (A-25). The fact that a written contract was not entered into at this point a irrelevant since Rule 1 of the Respondent's Tariff No 41 provides that a written contract is not necessary to create a customer relationship (A-38).

In addition to having standing to sue as the customer or intended beneficiary of the service, the Petitioner acquired standing as an occupant with a legal interest of the premises who is also the intended recipient of the services. Thus, Respondent's statement on page 10 of its Brief that the Fourteenth Amendment protections

¹See Rules 24(2) and 40(1)(d)(2) of the Rules of this Corras to timeliness of arguments.

apply to "persons" and not to "premises" not only appears to reassert the discredited personal v. property thats disting from which was structured by the structure of the fact that Petitioner's personal rights are being denied by Respondent when it anconstitutionally deprives her of the property right to continued receipt of electrical services during a billing dispute.

To accept Respondent's argument that only the filling party has standing to contest a utility company's termination action is to maintain that a non-billing accupant has no legal interest in receipt of utility ervice. This position is not only correctly to common tense and to public policy, but is contesty to caselaw. In this regard, since Respondent's challenged tariff requires that notice be provided prior to termination of

²In Pennsylvania, an incoming tenant cannot be held exponsible for the bills of the former occupant of the premises. Tyrone Gas and Water Co. v. Public Service Commission, 77 Pa. Sept. 292 (1921). See also, Beaver Valley Water Co. v. Public Strice Commission, 70 Pa. Super. 621 (1918); Pa. Chautauqua * Public Service Commission of Pa., 105 Pa. Super. 160 (1932). Smilarly, courts have held that a tenant who is the non-billing 74ny, has standing to challenge the termination of utility service his or her premises without prior notice and opportunity to he heard when the landlord billing party refuses or fails to pay te bill. Jackson v. Northern States Power Co., 343 F. Supp. 265 10. Minn., 1972); Davis v. Weir, 328 F. Supp. 317, 359 F. Supp. 1023 (N.D. Ga., 1971, 1973), affirmed 497 F.2d 139 (5th Cir., 1774) at 145, where the Court noted that the "Department's ettens offend not only equal protection of the laws but also due " D:ess."

service for nonpayment of a bill, it is submitted that such notice, in order to be meaningful and pan constitutional muster, must be furnished to the occupant of the premises. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Davis r. Weir, 328 F. Supp. 317, 359 F. Supp. 1023 (N.D. Ga., 1971, 1973), affirmed 497 F.2d 139 (5th Cir., 1974).

As an occupant with a legal interest in said premises, Petitioner is the customer and real party in interest, with standing to bring this action regardless of whether or not she was the prior billing party.

II.

RESPONDENT'S BRIEF FAILS TO PRO-VIDE A COMPREHENSIVE ANALYSIS OF THE CUMULATIVE EFFECTS OF THE VARIOUS INDICIA OF STATE ACTION.

A. A multi-dimensional approach is required.

In its brief, and contrary to the rule of Burton: Milmington Parking Authority, 365 U.S. 715 (1961) and Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972). Respondent seeks to avoid a finding of state action by treating the various indices of state action separately and in a vacuum. Rather, Petitioner submits that it is consideration of the cumulative effect of the several indices of state action that is required for a determination that ostensibly private conduct is taken under color of law. Thus, a finding of state action is required when specific governmental interests are

furthered by challenged conduct which is extensively regulated, authorized and approved by the state.

In this case the several indices of state action are integrally related to the conduct challenged. Hence, Respondent's status as a state sanctioned monopoly enables it to threaten to terminate a customer's services sithout fear of loss of competitive advantage. The fact that Respondent performs a public function in famishing electrical services furthers the state's interest a assuring the reasonably continuous supply of services at a reasonable price to its citizens. See 66 Pa. Stat. Anno. §1171. The joint participation of the Commonwealth with the Respondent derives a State guaranteed rate of return and is permitted to operate without significant competition, while the Commonwealth operation of the the efficient benefits from Respondent's activities and receives direct tax revenues therefrom. In addition, the Commonwealth derives an economic benefit when it delegates quasi judicial authority to the Respondent to adjudicate billing disputes and to deprive customers of property. Finally, the Commonwealth regulates and specifically authorizes, encourages, and approves the particular conduct challenged.

The thrust of Respondent's brief is not only to attempt to discredit the Petitioner's argument by isolating the various indices of state action, but also to utilize the "floodgates" argument for its in terrorem effect. Respondent implies that a finding of state action herein will result in a complete breakdown of the distinction between essentially private conduct and public action. However, in so doing, Respondent applies

Petitioner's argument out of context in this regard. State action need not be found solely because of state licensing or regulation, but instead, results where, is addition to the above, the conduct challenged promotes state interests and is authorized by the state which act as a partner in such conduct.³

B. The necessary indicia of state action are present in this case so as to require a finding that Respondent acted under color of law when it terminated Petitioner's electrical services.

In its brief, Respondent mistakenly attempts to isolate, distinguish or minimize the importance of the various indicia of state action set forth in Petitioner's brief.

 The state specifically approved the particular conduct challenged herein because Respondent's proposed termination of service tariff was passed by the Public Utility Commission following public hearings.

On pages 24-25 of its brief, Respondent notes that in 1971 it filed proposed tariffs for a rate increase with

³ Although failing to find state action where a bank set off in indebtedness against the checking account of a depositor, the First Circuit Court of Appeals noted that there was "little parallel" between a closely regulated bank and a public utility which has been chosen by the state to carry out a specific governmental objective. Fletcher v. Rhode Island Hospital Transpational Bank, 496 F.2d 927, 932 (C.A. 1, 1974).

republic Utility Commission. In its proposed tariff the respondent included certain of its prior tariffs, reluding Rule No. 15, the termination of service tariff. Rearings were then held before the Commission from reptember 30, 1971 to March 10, 1972. The commission granted a rate increase and did not order a change in Respondent's other regulations.

It is apparent from the above that the Commission considered and gave specific approval to Respondent's termination of service tariff. In *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952) state action resulted where the District of Columbia Public Utility Commission held hearings and specifically approved the challenged action. Respondent's challenged activity thus falls within the doctrine of *Pollak*, *supra*, and requires a finding of state action thereunder. *See Moose Lodge* 107 v. *Irvis*, *supra*.

Respondent performs a public function, which constitutes one index of state action.

Respondent contends that it does not perform a public function because the Commonwealth of Pennsylvania allegedly had no common law duty to furnish utility services to its citizens (Resp. Br., 11). Whether or not the Commonwealth originally had such a duty is immaterial, since, in passing the Public Utility Law, the Commonwealth in fact assumed an obligation to assure that its citizens receive reasonably continuous utility services at reasonable rates. 66 Pa. Stat. Anno. §1141,

§1171.⁴ See also Munn v. Illinois, 94 U.S. 113 (1877). Furthermore, conduct undertaken pursuant to common law "custom or usage" is certainly state action. Scr Adickes v. S.H. Kress Co., 398 U.S. 144 (1970). Reitman v. Mulkey, 387 U.S. 369 (1967).

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In addition to the above noted public function, the Respondent also performs a public function through the exercise of quasi-judicial authority delegated to it by the Commonwealth. Respondent can thus determine the lawfulness of its own regulations, adjudicate disputes between itself and its customers, and effect a seizure of property interests by terminating a customer's electrical services.

3. Pervasive state regulation of the conduct challenged is a significant index of state action.

Respondent charges that the distinction between public and private action will be destroyed if a finding of state action may rest upon the sole fact of a state regulatory scheme in a particular case. (Resp. Br., 14). However, Respondent misstates Petitioner's argument in this regard. Petitioner asserts only that a finding of state action is required where it is found that the state benefits from challenged conduct where it is found that the state benefits from challenged conduct which it

⁴The cases cited by Respondent in support of its positive predate the enactment of the Public Utility Law. Girard Life Insurance Co. v. The City of Philadelphia, 88 Pa. 393 (1879). Baily v. Philadelphia, 184 Pa. 594, 39 A. 494 (1898).

ates, encourages and authorizes. See Moose Lodge vis, supra. Thus, as noted by the district court in, the state must be involved not simply with some ity of the institution alleged to have inflicted by upon a plaintiff, but with "the activity that ed the injury" (A-1). See also Kadlee v. Illinois Telephone Co., 407 F.2d 624 (C.A. 7, 1969) cert., 396 U.S. 846 (1969). Certainly, as noted above, Commonwealth of Pennsylvania is so significantly lived in the Respondent's termination activity as to rant a finding of state action.

Respondent is a monopoly whose challenged activity herein is authorized by and promotes the interests of the Commonwealth of Pennsylvania.

Respondent disputes Petitioner's characterization of as a "state sanctioned monopoly". (Resp. Br., 15). Italinly, such a characterization cannot now be cously disputed in view of Gilmore v. City of

Hence, the mere fact that a state may regulate restaurants in aeral would not warrant a finding of state action in a situation volving excessive prices if the challenged prices are not cifically authorized by the state, but might very well warrant finding of state action in a situation where the state authorizes staurants to engage in challenged racial discrimination. See subard v. Louisiana, 373 U.S. 67 (1963).

Montgomery, Alahama, 94 S.Ct. 2416 (1974).6 Furthermore, it is apparent that the above characterization of Respondent is fully supported by the finding of the Pennsylvania Public Utility Commission, as recently and March 25, 1974 when it granted the Respondent a retrincrease of over \$18 million.7

⁶In Gilmore, supra, this Court noted that:

"Traditional state monopolies, such as electricity, water, and police and fire protection—all generalized governmental services—do not by their mere provision constitute a showing of state involvement in invidious discriminations." Supra, 2426.

It should be noted that Petitioner's legal position is the consistent with the above statement, since state action is presenter in not because Respondent is a state granted monopoly. It because the Respondent's monopoly status enables it seffectuate state interests and facilitates termination of a customer's services.

⁷In its Order of March 25, 1974, at R.I.D. 64, P.U.C. et al a Metropolitan Edison Co., -P.U.R. 4th-, the Commission next that:

"Respondent was incorporated under the laws of Pennsylvania on July 24, 1922, and is a subsidiary of General Public Utilities Corporation (G.P.U.), a holding company registered under the Public Utility Holding Company Act of 1935. G.P.U. now owns all the common stock of three operating electric subsidiaries; namely respondent, Pennsylvania' Electric Company, and Jersey Central Power and Light Company, which form a fully integrated power pool. G.P.U. is a member of the Pennsylvania - New Jersey - Maryland (P.J.M.) inter-connection, which consists of twelve operating utility companies combined into six member systems. Respondent participates in P.J.M. as a subsidiary of G.P.U...."

Respondent's monopoly status is significant because is by virtue of such state granted status that it is eabled to successfully threaten to terminate relitioner's service with impunity. In addition, the fact that Respondent's monopoly status promotes certain rate interests is significant in the consideration of the existence of state action. See Railway Employees' Expartment v. Hanson, 351 U.S. 225 (1956); Lathrop of Donahue, 367 U.S. 830 (1961).

5. The fact that Respondent's activities are subject to some Federal regulation is not incompatible with a finding of action under color of state law with regard to termination of service for nonpayment of a bill.

Respondent seeks to exempt itself from a state action analysis merely because it is subject to some Federal regulation (Resp. Br., 16). However, the fact that Respondent is subject to some Federal regulation less not negate the fact that it is also extensively regulated by the Commonwealth of Pennsylvania. Thether Respondent may be considered as acting on behalf of the state in a particular situation depends son how extensively the state is involved in that

[&]quot;At August 31, 1972, respondent furnished electric service to 312,188 customers located in all or portions of four cities, 92 boroughs, and 155 townships located within 14 counties in eastern and central Pennsylvania. The service area comprises approximately 3,300 square miles or seven per cent of the entire state, with an estimated population of 826,400 at December 31, 1972." Supra, pp. 4-5.

particular conduct.8 As noted above, the Commoswealth of Pennsylvania is significantly involved in the Respondent's challenged termination activity.

6. Respondent's actions constitute the effectuation of state policies which are repugnant to the Constitution.

On page 18 of its brief, Respondent suggests that : finding of state action should be confined only to case involving racial discrimination. Such a suggestire certainly lacks merit especially in light of the history of the Civil Rights Act, 42 U.S.C. §1983, the purpose of which was to provide protection not only for former slaves, but for all people who were deprived of federal rights under color of state law. Cong. Globe, 4254 Cong., 1st Sess., App. 68 (1871). See also Mitchum : Foster, 407 U.S. 224 (1972); Lynch v. Household Finance Corp., supra. Thus, this Court has decided numerous state action cases not involving racial discrimination. See Public Utilities Commission 1 Pollak, supra; United States v. Williams, 341 U.S. 97 (1950); Railway Employees Dept. v. Hanson, sugta Lathrop v. Donohue, supra; Marsh v. Alabama, 326 U.S. 502 (1946).

^{*}Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) noted by Respondent on page 17 of its brief, is fully consistent with this position, since in that case, Otter Tail was not exert from anti-trust action where its particular complained of condativation and subject to specific state governmental regulation and authorization.

Respondent correctly notes that there must be a exus between the state and its relationship with the allenged activity for state action purposes. (Resp. Br., 9). However, Respondent incorrectly states that ennsylvania law does not command or approve spondent's summary termination action. (Resp. Br.,)). By authorizing Respondent's termination of service riff, No. 41, Rule 15, through prior enactment of ections 202(d) and 401 of the Public Utility Code, 66 2. Stat. Anno. §§1122, 1171, and, as further athorized by Public Utility Commission Tariff Regulaon No. VIII and Electric Regulation Rule 14D, the Commonwealth of Pennsylvania has expressly anctioned the Respondent's challenged activities. furthermore, the fact that the Public Utility Commison actually held formal hearings in 1971 and 1972 regarding Respondent's proposed rate increase and arious other proposed tariffs, including Rule 15, the ry rule challenged herein, brings this case within the extrine of Public Utilities Commission v. Pollak, supra, as to justify a finding of state action based on the apress and formal approval by the state of the callenged termination activity.

Payment of taxes in itself need not justify a finding state action. (Resp. Br., 26). However, the Utilities

The fact that Respondent's revenues are subject to the Utilities Gross Receipts Tax is one index of state action.

Gross Receipts Tax, 72 P.S. §8101 et seq., is not a ordinary tax paid by all corporations, but instead, is unique tax paid only by public utilities, based upon gross revenues. Thus, the state directly benefits from payment of said tax as reflected in increased company revenues resulting from threatened utility terminations.

Respondent is correct in its position that the Utilities Gross Receipts Tax is no different from the 5% ptefs sharing arrangement recognized as prominent for state action purposes in *Ihrke v. Northern States Power Co.* 459 F.2d 566 (8th Cir., 1972), vacated for moothers 409 U.S. 815 (1972). (Resp. Br., 26). However, a should be noted in this regard that the finding of state action in *Ihrke, supra*, was based not only on such profit sharing arrangement between the utility and the City of St. Paul, but upon a variety of state action indicia, including extensive regulatory review of the utility's tariffs and pervasive governmental regulation of the utility's activities. Such factors, as noted above, are abundantly present in the instant case.

 In employing the authority of the Commonwealth to terminate Petitioner's electrical services, it is immaterial for state action purposes that the Respondent did not enter upon Petitioner's premises.

As noted above, contrary to Respondent's assertice (Resp. Br., 26), Respondent did terminate Petitioner's electrical service pursuant to state authorization. The fact that this termination was accomplished without

y on Petitioner's premises is irrelevant, since the ue is whether the Respondent may terminate services thout due process of law in the first instance. The cans by which such service is terminated is not nificant.9

9. Granting Petitioner due process of law will not deprive the Respondent of due process of law.

Respondent asserts that Petitioner seeks to use the deral courts to compel Respondent to furnish free ervice to its customers (Resp. Br., 28). This statement ectainly misconstrues the nature of this action. At no me has Petitioner asserted that she should be provided th free service. Indeed, although Respondent has efused to bill Petitioner for services following the immencement of this action (Resp. Br., 9), Petitioner as placed funds aside for her estimated electric bills rading termination of this action. Accordingly, titioner seeks to assure only that utility services not terminated without due process of law for failure to 24y a disputed bill.10 Petitioner does not seek to avoid

Respondent's tariffs authorizing entry on private property to aminate service were authorized by Commission Rule 14D and Commission Regulation No. VIII, and were subject to the Toroval of the Commission.

¹⁰The requirement of a prior hearing, as mandated by Fuentes * Fievin, 407 U.S. 67 (1972), in the absence of "extraordinary attumstances", Boddie v. Connecticut, 401 U.S. 371 (1971), is and modified by Amett v. Kennedy, 40 L.Ed.2d 15 (1974), or 7 Mitchell v. W.T. Grant Co., 40 L.Ed.2d 406 (1974).

payment of the current bill pending resolution of a disputed bill.

Arnett v. Kennedy, supra, involved the termination of a pub's employment situation where rights could be adequately ves cated by a post hearing review and where adequate administrator remedies were available. It should be noted in that case that 1:3 members of this Court adhered to the concept that "the adequacy of statutory procedures for deprivation of a statutoria created property interest must be analyzed in constitutions terms". Arnett v. Kennedy, supra (Opinior of Mr. Justice Powel concurring in part and concurring in the result in parts Furthermore, such property interests are not "created by the Constitution; rather, they are created and their dimensions 24 defined by existing rules that "stem from state laws." Board :t Regents v. Roth, 408 U.S. 564 (1972) at 577. Such properts interests are created and defined by the Pa. Public Utility Law 66 / Stat. Anno. §1171, in the instant case. In balancing the individual's property interests in due process of law against the competing interests of the state, factors such as the individual's "brutal need" and "being driven to the wall" must be afford: important consideration. Arnett v. Kennedy, (opinion of M: Justice White, concurring in part and dissenting in parts 40 L.Ed.2d at 54-55. Certainly, such factors are present in the instant case.

The case of Mitchell v. W.T. Grant, supra, involved a credit replevin situation specifically distinguishable from Fuentes suprain that, due to fear of disposal or waste by the debtor of the creditor's property, the creditor would be permitted to temporarily seize such property pursuant to a closely supervised procedure under control of the court from beginning to end. which a sworm affidavit and petition is presented to and approved by a judge, following posting of a bond. This procedure also allows for return of the property to the debtor and a immediate hearing upon posting of a counterbond by the debtor, upon whom the "impact" of a temporary deprivation is not

Respondent asserts that the tremendous hardship that would allegedly be imposed upon it by requiring it to food customers the opportunity to resolve disputed selfs before their services are terminated justifies a motinued denial of the constitutional rights of such assomers. Cer. aly, any added costs of administration must be subord atte to consideration of whether due process is to be provided in the first instance. See Bell Burson, 402 U.S. 535 (1971). Only after a determination is made that due process is required may consideration be given to what type of process is in fact face, following a "balancing" of the circumstances. Soard of Regents v. Roth, 408 U.S. 564 (1972)

In this case, although due process requires that astomers be afforded a prior opportunity to resolve disputes, the actual nature of the dispute resolution procedure may vary depending upon the circumstances of the case, a may be informal in the first instance. Contrary to Respondent's expressed fears, Petitioner foes not seek to impose an "inflexible" hearing requirement in every case. (Resp. Br., 28). Hence, the requirement of providing a conference with a company official or an informal hearing at the company level would seem to be an inexpensive method of resolving disputes. See Amicus Brief of the Public Service

^{*}here the temporary deprivation of utility services following a summary and unsupervised termination may affect life itself. *Felmer v. Columbia Gas of Ohio, 342 F. Supp. 241 (N.D. Ohio, *D., 1972), affirmed 479 F.2d 153 (C.A. 6, 1973).

Commission of New York. Certainly, the requirement of a formal hearing conducted by the Public Utility Commission following the failure of the utility company to satisfactorily resolve the dispute, would not involve such extensive costs as to make such procedure economically infeasible or constitutionally prohibitive in Finally, the cost involved in disposing of administrative appeals cannot outweigh due process requirements Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969). Thus, when presented with the very argument that the utility would suffer a undue financial burden if required to comport with due process of law, the Fifth Circuit Court of Appears stated:

"Finally, in view of the concededly small number of similar applicants, the miniscule percentage of the Department's revenue that is affected, the minimal cost of instituting constitutionally sufficient procedures, and the availability of other collection methods, we hold the City has failed to demonstrate any substantial detriment to its revenue bond rating." Davis v. We'; supra, 497 F.2d at 145.

¹¹See also "Re Rules and Regulations Governing the Disconnection of Utility Services", of the Vermont Public Services Board, 2 P.U.R. 4th 209 (April 19, 1974) at 218.

as well as at present, neither the Respondent's tariffs nor the Public Utility Commission's regulations provided for any formal method of dispute resolution prior to the termination of a customer's utility services.

CONCLUSION

For the foregoing reasons, Petitioner respectfully uses that this Court reverse the Judgment and Opinion of the Court below.

Respectfully submitted,

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of Counsel: JONATHAN M. STEIN, ESQUIRE

September 1, 1974

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UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

:

DOCUMENT NO.

DAVID L. SALISBURY

VS.

CIVIL NO. 15,770

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY and WILLIAM J. O'KEEFE

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IN THE UNITED STATES DISTRICT COURT FOR THE
JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY

VS

Plaintiff

Defendants

CIVIL DIVISION

File Number

15770

The SOUTHERN NEW ENGLAND TELEPHONE COMPANY, a Public Utitliy Corporation, and WILLIAM J. O'KEEFE, an attorney, employed by and for said company, and certain other employees, or agents of said company, whose names are presently unknown;

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JURY DEMANDED

COMPLAINT

COUNT I

1. This action arises under the Constitution of the United States, and the laws of the United States, and in particular, under the provisions of the First and Fourteenth Amendments to the Constitution of the United States, and under Federal Law, particularly the Civil Rights Act of 1871, Title 42, of the United States Code, Sections 1983, 1985, 1986 and 1988. The jurisdiction of this Court in invoked pursuant to the provisions of Title 28, Unites States Code, Sections 1343, 2201, and 2202.

2. This action is authorized at law and equity to redress the deprivation under color or pretense of state law, statute, ordinance, regulation, custom, or usage, of rights, immunities and privileges secured to Plaintiff by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens. The rights here sought to be redressed are the rights to full free on of speech guaranteed to Plaintiff by the First Amendment to the United States Constitution, and the rights guaranteed to Plaintiff by the due process and equal protection clauses, and the equal pri ileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully appears.

3. Plaintiff is an adult citizen residing at Hinman Road, Watertown,
Connecticut with his family. Plaintiff receives his mail at P.O. Box 1771,
Waterbury, Connecticut, 06720. During all times mentioned in this complaint,
Plaintiff was a customer of, and a subscriber to the telephone services
provided to himself and members of the general public by the Defendant,
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, under color of law, statute, rules,

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regulations, ordinances, customs, or usages of the State of Connecticut.

Plaintiff is now, and at all times has been, ready, willing and able to pay any just, correct, and/or lawful charges due to the Defendant uniformly charged to other customers and subscribers, subject to reasonable proof of disputed charges.

- 4. The Defendant, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, hereinafter called SNETCO, is a Public Utitlity Corporation, organized and existing under, and by virtue of the public laws and the special laws of the State of Connecticut, and having its main office and principal place of business at 300 George Street, New Haven, Connecticut, and further, having branch offices located throughout the State of Connecticut, and in particular, at 348 Grand Street, Waterbury, Connecticut. The Defendant, WILLIAM J. O'KKEFE, represents himself to be an attorney at law employed by and for the Defendant, SNETCO, and resides at 57 Vista Terrace, Cheshire, Connecticut, and maintains an office and business address at 227 Church Street, New Haven, Connecticut. The names and addresses of the other defendants, all of whom are agents, servants or employees of the Defendant, SNETCO, are presently unknown to the Plaintiff. As soon as the names and addresses and identities of the other defendants are discovered, Plaintiff will move this Court to amend his complaint to include their names, addresses and identities.
- 5. The Defendant, SNETCO, pursuant to the provisions of its charter, was incorporated, organized and created, inter alia, for the purpose to build, own, equip, buy, sell, operate, and maintain, systems of telephone exchange in any or all of said towns, cities, and villages of this State and of other States; and systems and methods of communication from and between any or all of said towns, cities, and villages of this State by means of telephones and telephonic apparatus; and generally to lease, rent, sell, and buy, telephones, and telephonic apparatus and rights of every and all descriptions; to sue and be sued, to plead and be impleaded, and to appear and prosecute to final judgment any suit or action at law or in equity in this state or elsewhere;...
- 6. The Defendant, SNETCO, operates its affairs and activities pursuant to an extensive and comprehensive statutory and regulatory scheme which regulates

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and controls every aspect of its activities and operations. The laws, statutes,
ordinances, rules and regulations of the State of Connecticut, and in
particular, the Public Utilities Commission of the State of Connecticut,
regulating and cor rolling the activities and operations of Public Utilities
within the State of Connecticut, including the Defendant, SNETCO, constitute a
vital service provided by the State of Connecticut to the members of the public
and to the Plaintiff.

7. The Defendant, SNETCO, performs a vital public function pursuant to
the regulation and control by the State of Connecticut as aforesaid, and
conducts its affairs, operations and activities in effect, as an agent of the
State of Connecticut, and under color or pretense of law, and in so doing, is
required to comply with the requirements of due process and equal protection

8. The conduct of its affairs, operations and activities by the Defendant, SNETCO, is carried out as aforesaid under color or pretense of law, in that the Defendant, SNETCO, has exclusive and monopolizing franchises to furnish telephone service to the Plaintiff, and to other members of the public throughout most, if not all, of the State of Connecticut. Further, the Defendant, SNETCO, has special permission from the legislature of the State of Connecticut to use public highways for performing the necessary functions to provide said telephone service. Further, the Public Utilities Commission of the State of Connecticut is duly authorized and empowered to further regulate and control the affairs, operations and activities of the Defendant, SNETCO, including, but not limited to, one or more of the following ways:

of the laws as guaranteed by the Constitution of the United States, as well

as each and every other right, privilege and immunity secured therein.

- a. Regulate the rates, schedules and operations of all Public Utilities.
- b. Require the filing and approval of rates, schedules, contracts, agreements, company rules and regulations, as a condition precedent to operation.
- c. Prescribe the rates, service and conditions of service for single persons.
- d. Prescribe, regulate and control any sale, acquisition, or merger by and/ or for any Public Utitlty, including the Defendant, SNETCO, of any or all of its assets or equipment.

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- e. Regulate and control the activities and affairs of Public Utilities, including the Defendant, SNETCO, with respect to customer deposits for service, and the return thereof, and the conditions under which the utility may terminate service to its customers.
- f. Hold hearings on request of Public Utilities requesting changes in rates, schedules or operations.
 - g. Require annual reports of the activities of Public Utilities.
- h. Permits the Defendant, SNETCO, and other Public Utilities to perform acts which they may not otherwise perform without violating State law.
- i. Apportion and assess fifty-six(56%) per cent of the expenses of the Commission among Public Utilities, including the Defendant, SNETCO, located in this State ... not exceeding six hundred thousand (\$600,000.00) dollars for any fiscal year.
- j. Provide penalties for failure to comply with the regulations of the Public Utilities Commission.
- k. Provide for judicial review of its decisions and orders affecting Public Utilities, including the Defendant, SNETCO, and decisions and orders affecting members of the public.
- 9. The Defendants, and each of them, acting under color of law, or pretense of law, have subjected Plaintiff, and other citizens, customers of the Defendant, SNETCO, to a pattern of conduct consisting of terminating telephone service, and of terminating said telephone service without notice and/or hearing, and without any provisions for an impartial hearing, and without notifying or informing Plaintiff, or other citizens, customers of said Defendant, of the reason(s), if any exist, for the termination of the telephone service as aforesaid, thereby denying and depriving Plaintiff, and other citizens, customers of the said Defendant, the rights, privileges, and immunities guaranteed to Plaintiff, and other citizens, customers of said Defendant, by the Constitution of the United States, and the laws of the United States, and further, this pattern of terminating telephone service as aforesaid, while carried out under color or pretense of law, have no excuse or justification in law, and are instead illegal and improper, and in no way

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necessary to the lawful and proper operations or activities of the Defendants.

- should have known of the fact, that the aforementioned pattern of conduct was carried out by their agents, servants, or employees, the Defendants, and each of them, have taken no step or effort to order a halt to this course of conduct, or to make redress to Plaintiff, or to take any disciplinary action whatsoever against any of their agents, servants, or employees, and have in fact, encouraged their agents, servants, or employees in this course of conduct which denies, and deprives Plaintiff, and other citizens, customers of said Defendant, the rights, privileges, and immunities secured to them by the Constitution of the United States and the laws of the United States.
- 11. On of about February 1st, 1972, the Defendants, and each of them, acting under color or pretense of the laws, statutes, ordinances, regulations, customs, and usages of the State of Connecticut, terminated the telephone service of this Plaintiff and his family at his residence at Hinman Road, Watertown, Connecticut. Further, said telephone service was terminated without notice or hearing of any kind, or without any provision for any hearing, and in particular without any provision for an impartial hearing, and said telephone service was not reinstated until on or about February 9, 1972 by the Defendants.
- 12. The Defendants, and each of them, by terminating Plaintiff's telephone service for nine days, abridged Plaintiff's right of freedom of speech as guaranteed by the First Amendment to the Constitution of the United States, and further, the refusal, neglect, or other failure of the Defendants, and each of them, to afford Plaintiff a hearing, and in particular, an impartial hearing prior to terminating his telephone service, denied and deprived Plaintiff of due process and equal protection under the law, and further, constituted a denial of equal rights, privileges, and immunities under the law, all of which are secured to Plaintiff by the Fourteenth Amendment to the Constitution of the United States and the laws of the United States.
- 13. On or about January 23rd, 1973, the Defendants, and each of them, acting under color or pretense of the laws, statutes, ordinances, regulations, customs, and usages of the State of Connecticut, again terminated the telephone

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services of this Plaintiff and his family at his residence at Hinman Road, in Watertown, Connecticut, and further, said telephone service was terminated without notice or hearing of any kind, or without any provision for any hearing, and in particular, without any provision for an impartial hearing.

14. On or about January 24th, 1973, and at divers times subsequent thereto, demand was made on the Defendants, and each of them, that the aforesaid telephone service be restored, and further, demand was made on the Defendants, on each of them, to advise, inform, and/or report to Plaintiff the reason(s), if any existed, for the termination of Plaintiff's telephone service.

15. The Defendants, and each of them, refused, and still refuse, to restore Plaintiff's telephone service, and further, Defendants, and each of them, have refused, and still refuse to advise, inform, or report to Plaintiff the reason(s), if any exist, for the termination of Plaintiff's telephone service, or to furnish Plaintiff with any particulars in connection with said termination, and have refused, and still refuse, to deal with Plaintiff regarding the termination of Plaintiff's telephone service or other acts as hereinbefore mentioned.

telephone service as aforesaid, and further, by terminating Plaintiff's telephone service as aforesaid, and further, by terminating said telephone service without notice, and/or without prior hearing, and in particular, a fair and impartial hearing, abridged and abrogated Plaintiff's right and privilege of freedom of speech as guaranteed to Plaintiff by the First Amendment to the Constitution of the United States, and further, said conduct and actions by the Defendants, and each of them, to afford Plaintiff a hearing, and in particular, a fair and impartial hearing prior to terminating his telephone service, and further, the refusal, neglect, or other failure of the Defendants, and each of them, to restore said telephone service, and/or to advise, inform, or report to Plaintiff the reason(s), if any exist, or existed, for said termination, or the refusal by the Defendants, and each of them, to deal with Plaintiff regarding the conduct and actions as aforesaid, have denied and deprived Plaintiff of due process and equal protection under the law,

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and further, have denied and deprived Flaintiff of the equal rights, privileges, and immunities secured to Plaintiff by the provisions of the Fourteenth Amendment to the Constitution of the United States, and the laws of the United States.

17. During all times mentioned herein, the Defendants, and each of them, separately, and in concert, engaged in the illegal conduct here mentioned to the injury of the Plaintiff, and denied and deprived Plaintiff of the rights, privileges and immunities secured to Plaintiff by the Constitution of the United States and the laws of the United States as aforesaid.

18. Further, the Defendants, and each of them, separately, and in concert, acted outside of the scope and intendment of the laws of the State of Connecticut, and the laws of the United States, and further, the Defendants, and each of them, separately, and in concert, acted wilfully, knowingly, and purposefully, and further, acted with the specific intent to deny and deprive Plaintiff of the rights, privileges, and immunities secured to Plaintiff by the Constitution of the United States, and the laws of the United States as aforesaid, all to his damage and injury.

each of them, as aforesaid, Plaintiff has actually and constructively been hindered and obstructed, and denied and deprived, of his right and privilege to telephone and communicate with his friends, business associates, attorneys, employers, police, firemen, doctors, hospitals, garages, members of the public, and others with whom Plaintiff must communicate, and has been denied and deprived from receiving telephone calls from his employers, attorneys, and family, all of which has caused Plaintiff much anxiety and distress, and has put Plaintiff to great inconvience, artdship and daily expense, and will continue to do so until said telephone service is restored. As a further direct and proximate result of the acts of the Defendants, and each of them, Plaintiff has been, and will continue to be required to spend a great deal of time daily away from home and family in order to pursue his daily activities, thereby denying him the quiet enjoyment of his property to which he is

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rightfully and lawfully entitled, and further, Plaintiff has been, and will continue to be required to spend much time and money daily until said telephone service is restored, in traveling great distances to public telephones, or to visit those friends, business associates, and attorneys with whom Plaintiff desires, or is required to communicate with in the daily pursuit of Plaintiff's business and/or social activities to which he is lawfully entitled. Further, Plaintiff has been, and will continue to be unable to summon emergency assistance, including police, firemen, doctors, or ambulances, garage service, or other emergency equipment for the protection of himself and his family and his property, and thereby he is now, and will continue to be greatly endangered in his, and his family's health, safety and welfare, and his property greatly jeopardized, and further, Plaintiff, and his family has been, and will continue to be unable to maintain communication with their respective employers, and therefore, Plaintiff and his family are in great and imminent danger of the loss of their occupations. Further, Plaintiff has been, and will continue to be greatly hindered and obstructed and delayed in communicating with his attorneys for necessary consultation regarding litigation pending in the State Courts. And further, Plaintiff has been, and will continue to be required to spend much time and money daily to try and have his telephone service restored and in preparation and prosecution of this action and in attempting to redress the rights, privileges and immunities secured to Plaintiff by the Constitution of the United States, and the laws of the United States, all of which have been wrongfully abrogated by the Defendants.

wherefore, Plaintiff respectfully prays that the Defendants and each of them, be cited to appear and answer herein as the law requires, and on final hearing hereof, have judgment against the Defendants, and each of them, jointly and severally, as follows:

- a. For the sum of \$15.00 per day for each and every day Plaintiff has been and will be without telephone service, as compensatory damages.
- b. For the sum of \$10,000.00 for such other general damages has Plaintiff has suffered and will continue to suffer as shall herein be found.

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C. For the sumof \$150.00 per day for each and every day Plaintiff has

c. For the sumof \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as punitive damages.

d. For legal interest from the date of each loss as shall herein be ascertained.

e. For such sums as this court may deem reasonable for attorney's fees for service in this action.

f. For all costs of suit and disbursements herein.

g. For such other, further, and additional relie's to this court may seem proper in the premises.

COUNT II

- 1. Paragraphs one through ten of the First Count are hereby incorporated and made paragraphs one through ten of this count as though more fully set forth herein.
- 11. On or about September 29th, 1970, Plaintiff commenced a c'vil action against the Defendant, SNETCO, returnable the Third Tuesday of November, 1970, to the Fourth Circuit Court for the State of Connecticut, located at 235 Grand Street, Waterbury, Connecticut, seeking to recover certain sums of money Plaintiff alleges are due him from the Defendant, SNETCO, which the Defendant refused, and still refuses to pay.
- 12. Paragraphs eleven through sixteen of the First Count are hereby incorporated and made paragraphs twelve through seventeen respectively of this count as tough more fully set forth herein.
- 18. The termination of Plaintiff's telephone service and other related acts on the respective days as aforesaid, by the Defendants, and each of them, acting separately and in concert, has actually and constructively hindered, obstructed, delayed, and otherwise interfered with and prevented Plaintiff from consulting and communicating with his attorneys in the prosecution of said lawsuit, and will continue to hinder, obstruct, delay and prevent Plaintiff from consulting and communicating with his attorneys in said matter in the future, all of which Defendants, and each of them well knew, or should

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have known, and said acts were done by the Defendants, and each of them, acting separately and in concert, to hinder obstruct, delay and otherwise prevent Plaintiff from prosecuting said lawsuit and to prevent Plaintiff from prevailing in said lawsuit, all of which is, and was illegal, unlawful and in contravention of the laws of the State of Connecticut and the laws of the United States, and denies and deprives Plaintiff of the rights, privileges, and immunities secured to Plaintiff by the provisions of the Fourteenth Amendment to the Constitution of the United States, all to his damage and injury.

- 19. Further, the Defendants, and each of them, acting separately and in concert, as aforesaid, acted knowingly, wilfully, purposefully, and with the specific intent to hinder, obstruct, delay and prevent Plaintiff from the lawful prosecution of said lawsuit and to prevent him from prevailing in said suit, all of which is illegal, unlawful, and denies and deprives Plaintiff of the rights, privileges and immunities secured to Plaintiff b the Constitution of the United States and the laws of the United States, all to his damage and injury.
- 20. Paragraph 19 of the First Count is hereby incorporated and made paragraph twenty of this count as though more fully set forth herein.

wherefore, Plaintiff respectfully prays that the Defendants, and each of them, be cited to appear and answer herein as the law requires, and on final hearing hereof, have judgment against the Defendants, and each of them, jointly and severally, as follows:

- a. For the sum of \$15.00 per day for each and every day Plaintiff has been and will be without telephone service, as compensatory damages.
- b. For the sum of \$10,000.00 for such other general damages has Plaintiff has suffered and will continue to suffer as shall herein be found.
- c. For the sum of \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as exemplary and punitive damages.
- d. For legal interest from the date of each loss, as shall herein be ascertained.

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David L. Salisbury vs The Southern New England Telephone Company - Complaint

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e. For such sums as this court may deem reasonable for attorney's fees

f. For all costs of suit and disbursements herein.

for service in this action.

g. For such other, further, and addition relief as to this court may seem proper in the premises.

COUNT III

1. Paragraphs one through eighteen of the Second Count are hereby incorporated and made paragraphs one through eighteen of this count as though more fully set forth herein.

19. The Defendants, and each of them, acting separately and in concert, have hindered, obstructed, and delayed Plaintiff further in the prosecution of said lawsuit with the intent to prevent Plaintiff from prevailing in said lawsuit, by divers additional illegal and improper acts, to wit; filing, or causing to be filed in said lawsuit, improper and sham and dilatory pleadings, all of which is unlawful and done for the purpose of impeding or defeating the due course of justice in said lawsuit, and to deny and deprive Plaintiff the equal protection of the laws, and to deny and deprive Plaintiff of the rights secured to Plaintiff by the Constitution and laws of the United States.

20. Paragraph nineteen of the Second Count is hereby incorporated and made paragraph twenty of this count as though more fully set forth herein.

21. On or before February 1st, 1972, and again, on or before January 23rd, 1973, the Defendants, and each of them, in violation of Title 42 United States Code, Section 1985 (2) and (3), did conspire and agree between themselves and with other persons, whose names are presently unknown to Plaintiff, to do the acts complained of hereinbefore, for the purpose of impeding, hindering, obstructing, or defeating the due course of justice in the State of Connecticut, and with the intent to deny and deprive Plaintiff the equal protection of the laws, and to injure Plaintiff for lawfully attempting to obtain his right under the Constitution and laws of the United States as hereinbefore set forth.

22. In furtherance of the object of said conspiracy, one or more of said

David L. Salisbury vs The Southern New England Telephone Company - Complaint
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Defendants and conspirators did do or cause to be done the acts and things as complained of in herein above and, in violation of Title 42 United States Code, Section 1985 (2) and (3), did thereby injure Plaintiff as hereinafter set forth, and denied and deprived Plaintiff of having and exercising his rights and privileges under the laws and Constitution of the United States as more particularly set forth in paragraph sixteen of the First Count herein.

23. Paragraph nineteen of the First Count is hereby incorporated and made paragraph twenty-three of this count as though more fully set forth herein.

24. As a further direct and proximate result of the acts of the Defendants, and each of them, as complained of herein above, Plaintiff has been put to considerable loss of time and money in the prosecution of the lawsuit mentioned in paragraph eleven of the Second Count, and will in the future be required to spend much extra time and money in the prosecution of said lawsuit, and is in imminent danger of the loss of the monies rightfully due him from the Defendant, SNETCO in that the actions of the Defendants, and each of them as aforesaid may well cause him the loss of his action.

WHEREFORE, Plaintiff respectfully prays that the Defendants, and each of them, be cited to appear and answer herein as the law requires, and on final hearing hereof, have judgment against the Defendants, and each of them, jointly and severally, as follows:

- a. For the sum of \$15.00 per day for each and every day Plaintiff has been and will be without telephone service as compensatory damages.
- b. For the sum of \$10,000.00 for such other general damages has Plaintiff has suffered and will continue to suffer as shall herein be found.
- c. For the sum of \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as exemplary and punitive damages.
- d. For legal interest from the date of each loss, as shall herein be ascertained.
- e. For such sums as this court may deem reasonable for attorney's fees for service in this action.

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- f. For all costs of suit and disbursements herein.
- g. For such other, further, and additional relief as to this court may seem proper in the premises.

COUNT IV

- 1. Paragraphs one through twenty-two of the Third Count are hereby incorporated and made paragraphs one through twenty-two of this count as though more fully set forth herein.
- 23. At all times mentioned herein, the Defendants, and onspirators, or one or more of them, had knowledge of the wrongs and conspiracies that were about to be committed, and ir fact were committed as hereinabove set forth, and further, the Defendants, and conspirators, or one or more of them, were empowered and duly authorized to prevent, or to aid in preventing the commission of said wrongs and conspiracies which denied Plaintiff of the equal protection of the laws guaranteed by the provisions of the Fourteenth Amendment to the Constitution of the United States, and the laws of the United States, the Defendants, or one or more of them, acting separately, or in concert, or omitting to act, wrongfully neglected to prevent, or to aid in the prevention of the commission of the wrongs herein mentioned against Plaintiff, and further, notwithstanding that under the law, the Defendants, or one or more of them were empowered and duly authorized to secure to Plaintiff the equal rights, privileges and immunities that are secured to Plaintiff which the Defendants, or one or more of them could have secured to Plaintiff by the excercise of reasonable diligence, the Defendant, and conspirators, or one or more of them, acting separately, or in concert, or emitting to act, and further by wilfully and intentionally acting, or omitting to act to prevent, or to aid in preventing, or to use reasonable diligence to prevent the commission of the wrongs and conspiracies herein above mentioned, all of which is in contravention of Title 42, United States Code, Section 1986, denied and deprived Plaintiff of the equal protection of the laws and the equal rights, privileges and immunities secured to Plaintif? () the Fourteenth Amendment of

David L. Salisbury vs The Southern New England Telephone Company - Complaint
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the Constitution of the United States and the laws of the United States.

24. Paragraphs twenty-three and twenty-four of the Third Count are hereby incorporated and made paragraphs twenty-four and twenty-five of this count as though more fully set forth herein.

WHEREFORE, Plaintiff respectfully prays that the Defendants, and each of them, be cited to appear and answer herein as the law requires, and on final hearing hereof, have judgment against the Defendants, and each of them, jointly and severally, as follows:

- a. For the sum of \$15.00 per day for each and every day Plaintiff has been and will be without telephone service as compensatory damages.
- b. For the sum of 10,000.00 for such other general damages has Plaintiff has suffered and will continue to suffer as shall herein be found.
- c. For the sum of \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as exemplary and punitive damages.
- d. For legal interest from the date of each loss, as shall herein be ascertained.
- e. For such sums as this court may deem reasonable for attorney's fees for service in this action.
 - f. For all costs of suit and disbursements herein.
- g. For such other, further, and additional relief as to this court may seem proper in the premises.

COUNT V

- 1. Paragraphs one and two of the First Count are hereby incorporated and made paragraphs one and two of this count as though more fully set forth herein.
- 3. Further, this is a proceeding for a preliminary and a permanent injunction, enjoing and restraining Defendants, and each of them, their agents, servents, employees and successors from continuing or maintaining any policy, practice, action, custor or usage of withholding, interfering, denying or

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David L. Salisbury vs The Southern New England Telephone Company - Complaint
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depriving, or attempting to withhold, deny, or deprive Plaintiff of any telephone service, or to otherwise interfere in any manner whatsoever with any telephone service to Plaintiff, and further, to enjoin, restrain Defendants, and each of them, their agents, servants, employees, and successors, from doing, or continuing, or maintaining any policy, practice, action, custom or usage of otherwise interfereing with, or denying or depriving Plaintiff of any rights, privileges, or immunities secured to Plaintiff by the Constitution of the United States and the laws of the United States in any way or manner.

- 4. Further, this is a proceeding for a declaratory judgment, brought pursuant to the provisions of Title 28, United States Code, Sections 2201, and 2202, to determine, adjudge, and declare the rights and relations, and/or the legal rights and relations of the parties, as is hereinafter more fully set forth.
- 5. Paragraphs three through ten of the First Count are hereby incorporated and made paragraphs five through twelve of this count as though more fully set forth herein.
- 13. Paragraphs eleven through eighteen of the Second Count are hereby incorporated and made paragraphs thirteen through twenty respectively of this count as though more fully set forth herein.
- 21. Paragraphs nineteen through twenty-two of the Third Count are hereby incorporated and made paragraphs twenty-one through twenty-four respectively of this count as though more fully set forth herein.
- 25. Paragraphs twenty-three, twenty-four, and twenty-five of the Fourth Count are hereby incroporated and made paragraphs twenty-five, twenty-six, and twenty-seven respectively of this count as though more fully set forth herein.
- 28. The conduct and actions by the Defendants, and each of them, as hereinbefore mentioned, against Plaintiff, has resulted in Plaintiff suffering immediate and irreparable injury, and unless enjoined and restrained, the damage and injury done to Plaintiff by reason of his being deprived and denied the rights, privileges and immunities as aforesaid, will be continuing and

David L. Salisbury vs The Southern New England Telephone Company - Complaint Page 16. irreparable, and Plaintiff has no plain, complete, and adequate remedy at law. WHEREFORE, Plaintiff respectfully prays that the Defendants, and each of them, be cited to appear and answer herein as the law requires, and that this Court advance this case on the doc'tet and order a speedy hearing of same and upon said hearing this Court: A. Have judgment against the Defendants, and each of them.jointly and severally as follows: a. For the sum of \$15.00 per day for each and every day Plaintiff has been, and will be without telephone service as compensatory damages. b. For the sum of \$10,000.00 for such other general damages Plaintiff has suffered and will continue to suffer as shall herein be found. c. For the sum of \$150.00 per day for each and every day Plaintiff has been and will continue to be without telephone service, as exemplary and punitive damages. d. For legal interest from the date of each loss, as shall herein be ascertained. e. For such sums as this Court may deem reasonable for attorney's fees for service in this action. f. For all costs of suit and disbursements herein. g. For such other, further, and additional relief as to this Court may seem proper in the premises. B. That this Court hold, adjudge, decree and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declaration shall have the force and effect of a final judgment, as follows: a. Whether the policy, prectice, action, rule, custom, or usage, by whatever name called, of terminating telephone service to Plaintiff without adequate notice, and a fair and impartial hearing prior to said termination, constitutes a denial and deprivation of the rights, privileges, and immunities secured to Plaintiff under the Constitution and laws of the United States. b. Whether the policy, practice, action, rule, custom, or usage, by

David L. Salisbury vs The Southern New England Telephone Company- Complaint
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whatever name called, of refusing to restore telephone service to Plaintiff, or to advise, inform or report to him the reasons therefore, if any exist, is unconstitutional in that said conduct constitutes a denial of the rights, privileges, and immunities secured to Plaintiff by the Constitution and laws of the United States.

- c. Whether the policy, practice, action, rule, custom, usage, by whatever name called, of hindering, obstructing, delaying, or otherwise interfering with Plaintiff in any legal action or proceeding in any manner, except as provided by law, is unconstitutional in that said conduct constitutes a denial of the equal protection of the laws, and is a denial of the rights, privileges, and immunities secured to Plaintiff by the Constitution and laws of the United States.
- d. Whether the Defendants, and each of they and their agents, servants, or employees, or successors may continue and maintain any of the above mentioned policies, practices, actions, rules, customs, usages, by whatever name called, that denies and deprives Plaintiff of the rights, privileges, and immunities secured to Plaintiff by the Constitution and laws of the United States, or otherwise in any manner deny, deprive of interfere with any rights, privileges, or immunities secured to Plaintiff as aforesaid.
- e. What the requirements of adequat notice should be, and what procedure would constitute a fair and impartial hearing prior to any termination, and upon whom would the burden of proof lie, and what provision should be made for any judicial review of any results of any hearing as aforesaid.
- C. That this Court issue and decree a premliminary injunction as the law provides, and upon final hearing make said injunctions permanent, enjoing and restraining Defendants, and each of them, their agents, servants, or employees, or successors, acting separately, or in concert, from doing, or continuing or maintaining any policy, practice, action, custom, or usage, as set forth below:
- a. Terminating Plaintiff's telephone service or otherwise interfering with Plaintiff's telephone service without adequate notice and a fair and

David L. Salisbury vs The Southern New England Telephone Company - Complaint
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impartial hearing prior to any termination or interference.

- b. Failing to advise, inform, or report to Plaintiff, and in writing, of any and all reasons, if any exist, for any termination or any interference with any telephone service prior to any hearing or request to terminate any telephone service to Plaintiff.
- c. Failing to advise, inform, or report to Plaintiff, and in writing, of any and all reasons, if any exist, for the termination of Plaintiff's telephone service on January 23rd, 1973, as aforesaid, and the reasons, if any exist for the continued conduct in refusing to restore said telephone service.
- d. Failing to follow any and all provisions of the Constitution and laws, statutes, rules, regulations, and ordinances of the State of Connecticut and the United States, in any relations concerning Plaintiff and the Defendants.
 - e. Refusing to restore or to furnish Plaintiff with telephone service.
- f. Hindering, obstructing, impeding, delaying, or otherwise interfering with Plaintiff in the defense or prosecution of any proceeding or legal action by any means, or in any manner, except as clearly authorized and provided for by law, statute, rule or regulation.
- g. Denying, depriving, or otherwise interfering with any rights, privileges, or immunities secured to Plaintiff by the Constitution and laws of the United States, and the State of Connecticut.
- h. Conspiring, agreeing, or planning between themselves, or others, to deny, deprive, or otherwise interfere with any rights, privileges, or immunities secured to Plaintiff by the Constitution and laws of the United States, and the State of Connecticut.
- i. Failing to prevent, or aid in preventing, or to use reasonable diligence in preventing any conspiracy, plan or agreement, as aforesaid.
- D. That this Court grant such other, further, additional, or alternative relief at law, or in equity, as to this Court may seem proper in the premises.

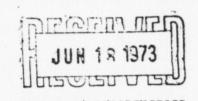
Respectfully submitted,

THE PLAINTIFF, Pro Se

David L. Salisbury

P.O. Box 1771 Waterbury, Connecticut 06720

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UNITED STATES DISTRICT COURT

FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY)	
Plaintiff)	CIVIL ACTION NO. 15770
VS.		
SOUTHERN NEW ENGLAND TELEPHONE		
COMPANY, INC., et al)	MOTION TO DISMISS COMPLAINT
Defendants)	

The defendants jointly move the Court to dismiss the action because the Complaint fails to state a claim against the defendants upon which relief can be granted, in that it appears on the face of the Complaint that:

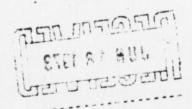
- 1) said complaint is unverified;
- 2) no discrimination is alleged, nor can it be:
- 3) the defendants were not acting under color of state law as a matter of law; and
- 4) no facts are alleged, nor can they be, to support a claim of a conspiracy or discrimination.

THE DEFENDANTS

SOUTHERN NEW ENGLAND TELEPHONE COMPANY WILLIAM J. O'KEEFE

BY

PETER J. TYRRELL
GRIFFIN & BRAYTON
48 Leavenworth Street
Waterbury, Connecticut 06702

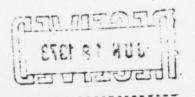


ATTORNEYS AT LAW WATERBURY, CONN.

CERTIFICATION OF SERVICE

I hereby certify that on the 15th day of June, 1973, a copy of the forgoing Motion to Dismiss Complaint was mailed, via U.S. Mail, postage prepaid, to David Salisbury, P. O. Box 1771, Waterbury, Connecticut.

PETER J. TYRRELL 48 Leavenworth Street Waterbury, Connecticut



ATTOPHE'S AT LAW WATERBURY, CONN.

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UNITED STATES DISTRICT COURT FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY)		
Plaintiff)	CIVIL ACTION NO. 15770	
vs.			
SOUTHERN NEW ENGLAND TELEPHON	ie.		
COMPANY, INC., et al)	ORDER	
Defendants	3)		
This cause came for	a hearing	on, 1973, on	
the defendants motion to dism	miss the act	tion because the Complaint fails	
to state a claim fagainst the	defendant	upon which relief can be granted	
because::			
1. said complaint	is unverif	Led;	
2. no discriminati	ion is alleg	ged, nor can it be;	
3. the defendants	were not ac	cting under color of state law as a	
matter of law; and			
4. no facts are a	lleged, nor	can they be, to support a claim of	a
conspiracy or discrimination	•		
and the Court having heard th	ne argument	of counsel and being fully advised,	
it is ORDERED that the defend	dants' motio	on to dismiss the action because	
the Complaint fails to state	a claim aga	ainst the defendant upon which relie	f
can be granted, and that the	Complaint 1	be and it is hereby dismissed (with	
leave to the plaintiff to fil	le an Amendo	ed Complaint within days)	
(without leave to amend and	that the ac	tion be dismissed with prejudice).	



UNITED STATES DISTRICT COURT JUDGE

ATTORNEYS AT LAW WATERBURY, CONN.

1973

UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

Nov & 1 01. FM '73 U. S. DISTRICT COURT NEW HAVEN, CONN.

DAVID L. SALISBURY

CIVIL NO. 15,770 :

THE SOUTHERN NEW ENGLAND TELEPHONE CO. and WILLIAM J. O'KEEFE

RULING ON DEFENDANTS' MOTION TO DISMISS

:

The plaintiff instituted this action pursuant to the provisions of the Civil Rights Act for declaratory relief and damages, alleging that he was denied the protections of procedural due process when the defendant public utility company discontinued his telephone service without notice or cause. The only issue posed by the defendants' motion to dismiss is whether termination of the service constitutes "state action."1/

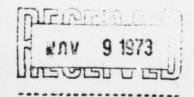
Reciting various civil rights claims under 42 U.S.C. \$\$ 1983, 1985, and 1986, the plaintiff's five-count complaint, filed pro se, is a rather lengthy, verbose document. In essence, however, it asserts that the defendant telephone company and its employees disconnected the plaintiff's service without cause, notice or hearing under color of

Since the defendants do not raise the issue whether the deprivation of telephone service is a cognizable right within the due process clause, the Court assumes they concede the point. See Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

and expense to the plaintiff and his family. Among other allegations, the plaintiff in his complaint and moving papers, recognizing the need to demonstrate a sufficient nexus between the State of Connecticut and the company, sets forth many factual and statutory references to sustain his position that the public utility is "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966).

The defendant company, on the other hand, contends that it is a privately owned, financed and operated company, that the Public Utilities Commission of the State of Connecticut "does not interfere, control or govern [the company's] daily business operation or operations of the corporation with the consumer", that the action of the company in terminating the plaint! f's service was taken pursuant to its own rules without utilizing any state statute or regulation and without any specific direction or authorization of a state regulatory body, that the "color of state law" test has not been satisfied and, therefore, the case should be dismissed.

Research of litigation under § 1983 between a public utility company and its customer based on the termination of service reveals differing results. This is inevitable



because no Supreme Court case sets out a precise definition of stare action. As stated by Justice Rebnquist in Moose lodge 107 v. Irvis, 407 U.S. 163, at 172 (1972):

Expenses of the Public Utilities Commission as defined in 310-47

While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "State action" on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."

See also Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

viable cause of action under the due process clause for the discontinuance of a utility service. See, e.g., Palmer v.

Columbia Ges Company of Ohio, Inc., 479 F.2d 153 (6 Cir.

1973) (nonpayment of bills); Ihrke v. Northern States Power

Company, 459 F.2d 566 (8 Cir.), vacated as moot, 409 U.S.

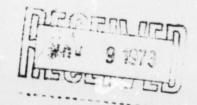
815 (1972) (nonpayment of bills); Bronson v. Consolidated

Edison Co., 350 F.Supp. 443 (S.D.N.Y. 1972) (nonpayment of bills); Hattell v. Public Service Company, 350 F.Supp. 240

(D. Colo. 1972) (nonpayment of bills); Stanford v. Gas Service

Company, 346 F.Supp. 717 (D.Kan. 1972) (nonpayment of bills).

On the other hand, other courts have held that the protections of the Fourteenth Amendment do not apply to terminations of utility services of to other practices of public utility companies. See, e.g., <u>Jackson v. Metropolitan Edison Company</u>, <u>F. 2d</u> (3 Cir. August 21,



1973) (nonpayment of bills); Lucas v. Wisconsin Electric

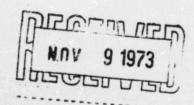
Power Company, 466 F.2d 638 (7 Cir. 1972) (en banc), cert.

denied, 409 U.S. 1114 (1973) (nonpayment of bills); Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189

(7 Cir.), cert. denied, 409 U.S. 890 (1972) (requirement of security deposits); Kadlec v. Illinois Bell Tel. Co., 407 F.

2d 624 (7 Cir.), cert. denied, 396 U.S. 846 (1969) (misuse of telephone service).

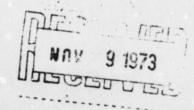
Reliance upon precedents, however, cannot be dispositive because, as stated in Palmer v. Columbia Gas of Ohio, Inc., supra, 479 F.2d at 162, "the significance of the involvement of the state in the actions of any kind of private conduct can only be determined by an examination of the facts of each particular case. . . " See also the catalogue of factors deemed relevant by Judge Kerner in Kadlec v. Illinois Bell Tel. Co., supra, 407 F.2d at 628 (concurring opinion). Thus, the Court must sift the facts and circumstances of each case in order to decide whether the extent of the state's involvement or control in the operations and management of the popule utility is such that the private firm becomes subject to the constitutional limitations placed upon state action. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). See generally Note, Fourteenth Amendment Due Process In Terminations Of Utility Services For Nonpayment, 86 Harv. L. Rev. 1477, 1485-1494 (1973).



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Accepting the plaintiff's allegations in his complaint as true, as is required, California Mctor Transport
Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972), and
based upon the Court's own research, it seems clear that the
defendant telephone company is comprehensively regulated and
controlled in almost every aspect of its activities by the
Public Utilities Commission of the State of Connecticut. A
perusal of Title 16 of the Connecticut General Statutes, and
the regulations promulgated thereunder by the Public Utilities Commission, discloses a pervasive statutory and regulatory scheme which affects the daily business life of all
public utilities in this State.

The P.U.C. has general supervision over all utility companies in Connecticut, and, among other things, has the power to examine safety conditions, Conn. Gen. Stat. § 16-11, investigate accidents, § 16-14, restrict use of streets, polas and wires, § 16-18, rule on rates, § 16-19, require annual reports, § 16-27, provide penalties for failure to comply with its regulations, § 16-41, and regulate mergers, sales, lesses, borrowing, lending, and all "managerial service contracts", § 16-43. Two additional statutes are significant in the light of the facts of this case. Section 16-20 permits any person aggrieved by the failure of a public utility to furnish service to appeal for relief to the P.U.C., and its decision is binding upon the company. However, resort to the statutory remedy is not mandatory, and



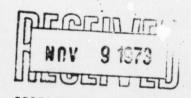
shutting off of service to coerce payment of a disputed bill." Steele v. Clinton Electric Light & Power Co., 123 Conn. 180, 187 (1937). Section 16-49 provides for a revenue and expense sharing plan whereby 56% of the expenses of the P.U.C. each year are apportioned and assessed among all public service companies. Thus, the State is a direct beneficiary of a portion of all monies received by the utility company from its customers.

Under these circumstances and at this stage of the proceedings, it seems clear that the operations of the defendant company are fully circumscribed and supervised by the State of Connecticut and its regulatory agency, including in general the specific activity complained of in the present lawsuit. There has been a sufficient showing that the defendant utility company acted under color of state law in terminating plaintiff's telephone service without notice or just cause.

Accordingly, the defendants' motion to dismiss is denied.

Dated at New Haven, Connecticut, this 7th day of November, 1973.

Robert C. Zampano
United States District Judge



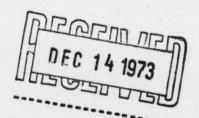
UNITED STATES DISTRICT COURT

FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY)	
Plaintiff)	CIVIL ACTION NO. 15770
Vs.		
SOUTHERN NEW ENGLAND TELEPHONE		
COMPANY, INC., et al)	COUNTERCLAIM
Defendants)	

- 1. The defendant, Southern New England Telephone Company, has a claim against the plaintiff, David L. Salisbury, arising out of the transaction or occurrence that is the subject matter of said plaintiff's claims, as set forth in his Complaint, and the adjudication of which does not require the presence of third parties over whom the Court herein cannot acquire jurisdiction.
- 2. The defendant is a corporation organized and existing under the laws of the State of Connecticut, having its office and principal place of business in the City of New Haven and having branch offices in other cities and towns of the State of Connecticut, and is engaged in the business of supplying telephone service to its subscribers.
- The plaintiff was a subscriber of the defendant's telephone service and resided at Hinman Road, Watertown, Connecticut.
- 4. On or about July 21, 1972, and for some time prior thereto, the plaintiff was a subscriber of the defendant, and on said day the defendant mailed a monthly bill to the plaintiff, which monthly bill was paid in full.

GRIFFIN and BRAYTON ATTORNETS AT LAW WATERBURY, CONN.



- 5. On the 21st day of the months of August, September, October,
 November, December, all of 1972, and January 21, 1973, the defendant of 11ed
 a monthly bill to the plaintiff for telephone services rendered according
 to its tariff regulations.
 - 6. Said bills were either partially paid or remained unpaid.
- 7. On or about January 23, 1973, there remained and due an outstanding bill in the amount of \$49.71 from the plaintiff.
- 8. The defendant at all times herein remained ready, willing and able to perform and deliver telephonic service to the plaintiff and in fact, did deliver said telephonic service to the plaintiff for the aforementioned dates; to wit: from August 21, 1972, to January 23, 1973, when the plaintiff's service was terminated.
- 9. After crediting the plaintiff with the unused portion of the month, within which his telephone service was terminated, there was a credit given the plaintiff of \$6.80, reducing his o'ligation to \$42.81.
- 10. Due demand was made upon the plaintiff for said sum, yet the same is due and owing to date.

THE DEFENDANT CLAIMS:

FIFTY AND 00/100ths DOLLARS (\$50.00) Damages.

THE DEFENDANTS

BY

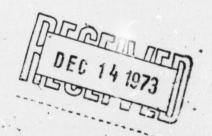
PETER J. TYRRELL 48 Leavenworth St. Waterbury, Connecticut 06702

CERTIFICATION

I hereby certify that on the 13th day of December, 1973, a copy of the foregoing Counterclaim was mailed, via U.S. Mail, postage prepaid, to David Salisbury, P. O. Box 1771, Waterbury, Connecticut.

PETER J. TYRRELL

GRIFFIN and BRAYTON ATTORNEYS AT LAW WATERBURY, CONN.



UNITED STATES DISTRICT COURT

FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALIS	BURY)		
	Plaintiff)	CIVIL ACTION NO.	15770
vs.				
SOUTHERN NEW E	NGLAND TELEPHONE			
COMPANY, INC.,	et al)	ANSWER	
	Defendants)		

FIRST COUNT:

- 1. The defendants admit Paragraph No. 4, No. 5 and No. 6.
- 2. The defendants deay Paragraph No. 1, No. 7, No. 8, No. 9, No. 10 No. 11, No. 12, No. 13, No. 15, No. 16, No. 17, and No. 18.
- 3. As to the allegations contained in Paragraph No. 2, No. 3, No. 14, No. 19, the defendants have insufficient knowledge upon which to form a pleading are therefore leave the plaintiff to his proof.

SECOND COUNT:

- 1. The answers of Paragraphs No. 1 through 10 of the First Count are hereby correspondingly made Answers to Paragraph 1 through 10 of this Second Count, as if more fully set forth herein.
 - 11. Paragraph No. 11 is admitted.
- 12. The answer to Paragraph No. 11 through 16 of the First

 Count are hereby correspondingly made Answers to Paragraphs No. 12 through

 No. 17 of this Count as if more fully set forth herein.
- 18. The defendants have no knowledge upon which to form a pleading and therefore leaves the plaintiff to his proof.
 - 19. The defendants deny Paragraph No. 19.
- 20. The defendants have insufficient knowledge upon which to form a pleading and therefore leave the plaintiff to his proof.

GRIFFIN and BRAYTON ATTORNETS AT LAW WATERBURY, CONN.

THIRD COUNT:

- 1. The answers to Paragraphs No. 1 through No. 18 of the Second Count are hereby correspondingly made Paragraphs No. 1 through No. 18 of this Count, as if more fully set forth herein.
 - 19. The defendants deny Paragraphs No. 19, No. 20, No. 21, and No. 22.
- 23. As to Paragraphs No. 23 and No. 24, the defendants did have insufficient knowledge upon which to form a pleading and therefore leave the plaintiff to his proof.

FOURTH COUNT:

- 1. The answers to Paragraphs No. 1 through No. 22 of the Third Count are hereby correspondingly made the answers to Paragraphs No. 1 through No. 22 of this Count, as if more fully set forth herein.
 - 23. The defendants deny Paragraph No. 23.
- 24. As to the allegations contained in Paragraph No. 24 and No. 25, the defendants have insufficient knowledge upon which to form a pleading, and therefore leave the plaintiff to his proof.

FIFTH COUNT:

- 1. The answers to Paragraph No. 1 and No. 2 of the First Count are correspondingly made herby Answers to Paragraphs No. 1 and No. 2 of this Count, as if more fully set forth herein.
- 3. As to the allegations contained in Paragraphs No. 3, No. 4, No. 28, the defendants have insufficient knowledge upon which to form a pleading and therefore leave the plaintiff to his proof.
- 5. The Answers to Paragraphs No. 3 to No. 10 of the First Count are hereby correspondingly made Answers to Paragraphs No. 5 through No. 12 of this Count, as if more fully set forth herein.
- 13. The answers to Paragraphs No. 11 to No. 18 of the Second Count are hereby correspondingly made Answers to Paragraphs 13 to No. 20 of this Count as if more fully set forth herein.

GRIFFIN and BRAYTON ATTORNEYS AT LAW WATEROURY, CONN.



FILED

- 3 -

- 21. The answers to Paragraphs No. 19 through No. 22 of the ThiriCount are hereby correspondingly made the Answers to Paragraph No. 21 through
 No. 24 of this Count, as if more fully set forth herein.
- 25. The answers to Paragraphs No. 23 to No. 25 of the Fourth Count are correspondingly made the Answers to Paragraphs No. 25 through No. 27 of this Count, as if more fully set forth herein.

FIRST AFFIRMATIVE DEFENSE

Pursuant to 28 U.S.C., Sec. 1342, this Court does not have jurisdiction to restrain the defendants from complying with the Connecticut Public Utilities.

Commision Tariff Regulations, or a case arising thereunder.

SECOND AFFIRMATIVE DEFENSE

This Court does not have jurisdiction to entertain the plaintiff's civil rights cause of action, as the plaintiff has not exhausted his state administrative remedies.

THE DEFENDANTS

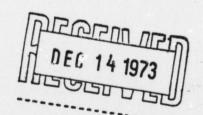
Y____

PETER J. TYRRELL

48 Leavenworth Street Waterbury, Connecticut 06702

CERTIFICATION

I hereby certify that on the 13th day of December, 1973, a copy of the foregoing Answer was mailed, via U.S. Mail postage prepaid, to David Salisbury, P. O. Box 1771, Waterbury, Connecticut.



PETER J. TYRRELL

ATTORNEYS AT LAW WATERBURY, CONN.

HAY 21 10 53 AH '75

UNITED STATES DISTRICT COURT

FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L.	SALISBURY).	1.
	Plaintiff)	CIVIL ACTION NO. 15770
	vs.		
	NEW ENGLAND TELEPHONE INC., et al)	
COMPANT,	Inc., et al	,	
1	Defendants)	MOTION TO RECONSIDER DEFENDANT'S MOTION TO DISMISS

The defendants in the above entitled action request this Court to reconsider its November 8, 1973, ruling on their prior Motion to Dismiss in view of the United States Supreme Court decision on December 23, 1974 entitled Jackson v. The Metropolitan Edison Co.

U.S.

23LW4110.

THE DEFENDANTS,
SOUTHERN NEW ENGLAND TELEPHONE COMPANY
WILLIAM J. O'KEEFE

Peter J. Tyrrell
49 Leavenworth Street
Waterbury, Connecticut 06702

CERTIFICATION

I hereby certify that on the 28th day of February, 1975, a copy of the foregoing Motion to Reconsider Defendant's Motion to Dismiss was mailed via U.S. Mail, postage prepaid to David Salisbury, P. O. Box 1771, Waterbury, Connecticut.

PETER J. TYRREY

GRIFFIN and BRAYTON, P.C.
ATTORNEYS AT LAW
WATERBURY, CONN.

<u>O R D E R</u>

	The	forego	ing	motion	having	been	heard	, it	is	hereby	ORDER	ED:
GRANTED		_	DEN	NIED								
i												
							BY '	THE C	OUR	Т		
1												
												CLERK

GRIFFIN and BRAYTON, P.C.
ATTOPNEYS AT LAW
MATERBURY, CONN.

IN THE UNITED STATES DISTRICT COURT FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY

Plaintiff

CIVIL ACTION

VS.

File No. 15, 770

The SOUTHERN NEW ENGLAND TELEPHONE

COMPANY, INC., ET AL

Defendants

March 17, 1975 .

PLAINTIFF'S AFFIDAVIT ON UTILITY ASSESSMENTS BY THE PUBLIC UTILITIES COMMISSION, IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UPON RECONSIDERATION.

- I, <u>DAVID L. SALISBURY</u>, Plaintiff in the above entitled action, being duly sworn, do depose and say:
- 1. That I am over the age of eighteen years, and I believe in the obligation of an oath.
- This affidavit is made on my personal knowledge, and all facts contained herein are, the best of my knowledge and belief the truth.
- 3. On Friday, March 7th, 1975, I proceeded to Hartford, Connecticut, to the offices of the Public Utilities Commission of the State of Connecticut.
- 4. Within the accounting offices of said Public Utilities Commission, upon presentation of the letter attached hereto, I was allowed to inspect the records of the said Public Utilities Commission pertaining to the expenses of said Commission, the revenues of the utilities under its jurisdiction, and the amounts assessed those utilities liable therefore for assessment, for the fiscal years shown on the chart also hereto attached.

- 5. I obtained a true and certified of the revenues, expenses and assessments, as set forth on the chart attached hereto.
- 6. The figures set forth on said chart are true and accurate copies taken from said records of the Connecticut Public Utilities Commission.
- 7. Said figures reflect the true extent of the joint participation
 between Connecticut utilities, and the defendant, Southern New England Telephone
 Company in particular, and the Connecticut State Public Utilities Commission.
 FURTHER, DEPCNENT SAYETH NOT.

THE PLAINTIFF

DAVID L. SALISBURY, Pro Se

P.O. Box 1771 Waterbury, Connecticut 06720

Dated at Waterbury, Connecticut, this day of March, 1975

STATE OF CONNECTICUT)

as: Waterbury, Connecticut, March 17, 1975

COUNTRY OF NEW HAVEN)

Personally appeared, David L. Salisbury, the signer and sealer of the foregoing Affidavit, who made truth to the truth of the matters contained therein before me.

RICHARD A. JOSEPH

Commissioner of the Superior Court

CERTIFICATION:

I hereby certify that I have mailed, postage prepaid, a true copy of the foregoing affidavit and chart attached thereto, to Atty. Peter J. Tyrrell, counsel for the defendants.

DA L. SALISBURY, Pro Se

P.O. Box 1771

Waterbury, Connecticut 06720

David L. Salisbury P.O. Box 1771 Waterbury, Connecticut 06720

March 6, 1975

Public Utilities Commission State Office Building Hartford, Connecticut 06115

Attn: Mr. Henry Mierzwa, Executive Secretary

Dear Sir:

Please be advised that I am the Plaintiff in a Civil Action in the Federal Court against the Southern New England Telephone Company.

It is essential for me to ascertain certain facts which are public record involving the defendant Telephone Company.

Pursuant to § 16-49 (a) of the Connecticut General Statutes as amended, the Commission shall apportion and assess fifty-six (56%) percent of the expenses of the Commission not exceeding six hundred thousand (\$600,000.00) dollars against servain utilities, including the defendant.

Therefore, would you kindly supply me with the information needed according to the chart attached, and certify the same as a true and accurate copy of your records so that it may be entered into the Court record.

Thank you for your kind attention to this matter.

Very truly yours,

David L. Salisbury

David L. Salis lung

encl;

Federal District Court District of Connecticut Federal Building New Haven , Connecticut Civil File # 15770 Expenses of the Public Utilities Commission as defined in §16-49 or the Connecticut Queneral Statutes as amended, and apportionment of those expenses of the Connecticut and the amounts paid by the Southern New England Telephone Company for the years indicated.

YEAR	co	MISSION EXPENSES		OTAL AMOUNT ASSES	SED	A STATE OF THE OWNER,	AMOUNT PA	ENG.	TEL. CO.
1970	Exp. 7	12,019.57	Revi ASS.	796,366131		Ass.	127,38	7.92	
1971	Ex1	753,430,69		376,715,35			298,921,		,0004294419
1972	6xP.	893,930,97		500,601.34			7,195,478		,0004922033492
1973	EXP.	1,190,216.56 % 666,521,27		1,134,209,488,			719,596	. , 0	0058>6527017

RO. BOY 1562 New HAVEN, CONN. 06798

CERTIFICATION.

Certified a true copy

March 7, 1975

CERTIFIED A TRUE COPY

PUBLIC UTILITIES COMMISSION
STATE OF CONNECTICUT

DATE: 3/7/1975

FILED ARR 21 1 08 PH '75

U.S. DISTRICT COURT
UNITED STATES DISTRICT COURTEW HAVEN, CONN.

DISTRICT OF CONNECTICUT

DAVID L. SALISBURY

•

CIVIL NO. 15770

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY and WILLIAM J. O'KEEFE

1

RULING ON DEFENDANTS' MOTION TO RECONSIDER MOTION TO DISMISS

The plaintiff, appearing pro se, commenced this civil rights action under 42 U.S.C. \$\$ 1983, 1985, 1986, and 1988 claiming that the defendant public utility company, with one of its attorneys, discontinued his telephone service without notice or just cause in violation of his right to procedural due process.

(December 23, 1974). The Court having reconsidered its prior ruling on the basis of the papers submitted and the Supreme Court's opinion in <u>Jackson</u>, the defendants' motion to dismiss is now granted for reasons set forth below.

was a divergence of opinion regarding the state action question in cases involving the discontinuance of utility service. See cases cited in Salisbury, supra at 1024. In light of this disparity among the Circuits, and in view of the emphasis on close examination of the facts in state action cases, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Palmer v. Columbia Gas of Ohio, Inc., 479 F. 2d 153, 162 (6 Cir. 1973), this Court found that the "comprehensively regulated and controlled" defendant public utility operated under color of state law in terminating plaintiff's telephone service. 365 F.Supp. at 1025.

In <u>Jackson</u>, however, the Supreme Court held that the termination of electrical service by a privately owned and operated, but neavily regulated, utility did not constitute

Although the defendants have never addressed plaintiff's claims under 42 U.S.C. §§ 1985, 1986, and 1988, the Court has considered the sufficiency of these claims sua sponte. The complaint does not state a cause of action under 42 U.S.C. §§ 1985 and 1986 because it fails to allege intentional or purposeful discrimination designed to favor one individual or class over another, as required by 42 U.S.C. § 1985(3). Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); Denman v. Leedy, 479 F.2d 1097 (6 Cir. 1973). 42 U.S.C. § 1988 creates no independent cause of action. Moor v. Alameda County, 411 U.S. 693 (1973).

state action. Neither regulation, nor the fact that such regulation was "detailed and extensive," converted action of a utility company into that of the State. 43 U.S.L.W. et 4111-12; see Moose Lodge No. 107 v. Irvis, supra at 176-77; Public Utilities Commission v. Pollak, 343 U.S. 451, 462 (1952); Holodnak v. Avco Corp., F.2d (2 Cir. 1975), Slip Op. at 1837. It therefore affirmed the dismissal of plaintiff's § 1983 action.

Plaintiff, in the case at bar, attempts to distinguish Jackson on four grounds. It is first argued that by performing an essential public service, the utility company is performing a traditional state function. See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946) (company town); Evans v. Newton, 382 U.S. 296 (1966) (municipal park). While Jackson acknowledged the viability of the traditional state function doctrine, 43 U.S.L.W. at 4112, the Court concluded that the utility did not operate within the domain "traditionally the exclusive prerogative of the State" because the Pennsylvania statute imposed no obligation upon the State to furnish electrical services. The Court declined to expand the traditional state function doctrine to a "broad principle that all businesses 'affected with the public interest' are state actors in all actions." Id. Plaintiff at bar concedes that no obligation attaches to the State of Connecticut to furnish utility service; therefore state action may not be

Additionally, plaintiff suggests in his brief that defendants monopoly status under the auspices of the Connecticut Public Utility Commission justifies a finding of state action. However, a monopoly status has been consistently held to be not determinative of the question. See <u>Jackson</u>, supra; <u>Moose Lodge No. 107</u>, supra; <u>Pollak</u>, supra at 462.

premised on this ground.

Plaintiff next claims that affirmative approval by the Public Utilities Commission provides the sufficient nexus between the utility company's termination and the State. Affirmative approval of termination procedures subsequent to hearings may bear on the state action issue.

Public Utilities Commission v. Pollak, supra. Yet Jackson is clearly dispositive of this issue. Referring to approval of termination procedures, Justice Rehnquist stated:

Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action."

43 U.S.L.W. 4114.

As in <u>Jackson</u>, supra at 4113, plaintiff's utility service was terminated under tariffs filed by the defendant, rather than under regulations prescribed by the Connecticut Public Utilities Commission. Further, there has been no evidence presented that termination procedures have been the subject of Commission scrutiny. To the contrary, they are part of tariffs acquiesced in by the Commission since the tariffs became effective in 1934. "[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." <u>Powe v. Miles</u>, 407 F.2d 73, 81 (2 Cir. 1968).

The plaintiff's third contention is that the State somehow has encouraged the defendant utility company to deny plaintiff due process of law. See Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Reitman v. Mulkey, 387 U.S. 369 (1967). Adickes and Reitman dealt with state encouragement of the particular constitutionally violative acts there in question. There is no evidence before this Court that the Connecticut Public Utilities Commission has played such a role in the plaintiff's alleged deprivations. Quite to the contrary, plaintiff's only contention is that the utility company-utility commission relationship represents encouragement per se. In view of Jackson, this contention must fail.

Finally, the plaintiff suggests that Conn. Gen. Stat \$ 16-49, providing a scheme by which public utility companies furnish 56% of the Public Utilities Commission's expenses, creates a symbiotic relationship between the privately owned public utilities and the Commission. This argument appeals to the authority of Burton v. Wilmington Parking Authority. supra, where state action was found in the discrimination practices by a private restauranteur who leased his premises from a municipal parking authority and operated his restaurant within the confines of a public parking structure. There, physical proximity and a \$28,700 annual rent were found sufficient to support the conclusion that "[t]he State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity . . . " Id. at 725.

Nonetheless, Pennsylvania has a statute similar to Conn. Gen. Stat. \$ 16-49 providing for the assessment of regulatory expenses upon public utilities. Penn. Stat. 66 § 1461. Without specially alluding to this financial interdependence, the Supreme Court in Jackson found the symbiotic relationship present in Burton absent between the Metropolitan Edison Company and the Pennsylvania Public Utilities Commission. The same result is dictated in the case at bar. Justice Rehnquist's conclusion in Jackson is appropriste to the case presently before this Court: All the [plaintiff's] arguments taken together show no more than that [defendant] was a heavily regulated private utility, enjoying at least a partial more in the providing of . . . service within its territory, and that it elected to terminate service to [plaintiff] in a manner which the . . . Commission found permissible under state law. Under our decision this is not sufficient to connect the State . . . with [defendant's] action so as to make the latter's conduct attributed to the State 43 U.S.L.W. at 4114. Accordingly, applying the guidelines set forth in Jackson, defendant utility company's termination of plaintiff's telephone service does not constitute state action. The defendants' motion to dismiss is granted; the case is hereby dismissed. Dated at New Haven, Connecticut, this 18th day of April, 1975.

> Robert C. Zampano United States District Judge

FILED

UNITED STATES DISTRICT COURT

APR 23 9 09 AH '75

DISTRICT OF CONNECTICUT

U. S. DISTRICT COURT NEW HAVEN. COMM.

DAVID L. SALISBURY

CIVIL NO. 15,770

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY and WILLIAM J. O'KEEFE

JUDGMENT

This cause having first come on for consideration on defendants' motion to dismiss, said motion having been denied by the Court in its Ruling on Defendants' Motion to Dismiss the Complaint, entered November 8, 1973; thereafter, the defendants having filed another motion to dismiss and motion for summary judgment and the Court having denied same and all pending related motions filed by plaintiff and defendant, in its Ruling on Motiva for Summary Judgment, entered February 10, 1975, but allowing defendants 20 days from the date of said Ruling to file a motion requesting this Court to reconsider its November 8, 1973 ruling on their motion to dismiss, and said Motion to Reconsider Defendants' Motion to Dismiss having been filed and considered by the Court, and the Court having rendered its Ruling on Defendants' Motion to Reconsider Motion to Dismiss, under date of April 21, 1975, granting same,

It is ORDERED and ADJUDGED that plaintiff recover nothing and that this action be and is hereby dismissed, with costs to the defendants.

Dated at New Haven, Connecticut, this 25th day of April, 1975.

Sylvester A. Markowski

Clerk, United States District Court

Deputy In Charge

IN THE UNITED STATES DISTRICT COURT FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBUR	Y)	
	Plaintiff)	
. vs)	CIVI D.VISION
The SOUTHERN NEW	ENGLAND)	FILE NUMBER 15,770
TELEPHONE COMPANY	, INC.,)	
and WILLIAM J. 0'	KEEFE,)	NOTICE OF APPEAL
ET ALS,	Defendants	}	. May 14, 1975

Notice is hereby given that DAVID L. SALISBURY, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 25th day of April, 1975.

The Plaintiff

David L. Salis hun David L. Salisbury

1771 P.O. Box Waterbury, Connecticut 06720

CERTIFICATE OF SERVICE

On this 21⁵¹ day of May , 1975, a true and correct copy of the foregoing was served upon the Defendants- Appellees by mailing same to their counsel of record.

SALISBURY VS S.N.E.T.CO., CIVIL NO. 75-7324 APPALLENT'S BRIEF

ii

TABLE OF AUTHORITIES

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2A Moore, Federal Practice, 2d Ed., 912.08	10

NOV 1 0 1975 David L. Salisbury P.O. Box 1771 Waterbury, Connecticut 06720 November 8, 1975 Hom. Daniel Fusaro, Esq. Clerk, United States Court of Appeals Second Circuit, United States Courthouse Foley Square New York, N.Y. 10007 Re: Docket No. 75-7324, Salisbury vs S.N.E.T.CO., et als Attn: Miss Valentine, Pro Se Office Dear Miss Valentine; I bring to your attention the enclosed original and six copies of the supplemental certification requested by Mr. Fusaro. I was somewhat surprised to receive his letter last night since I had heard nothing from the Court this past week, and you indicated to me in our telepphone conversation Thursday that everything was O.K. I trust that this pleading will serve the purpose. I was under the impression that my original certification of service on p. 24 of my brief was sufficient. At the time it was made I did not know the manner service would be made. I attempted to make service at the time I mailed the brief Monday night. However, the outer office door to the building where his offices are located, (around the corner from the Post Office) were locked, and there was no mail slot. The package would not fit under the door. I was unable to mail it because the postage machines were not working. I had a great deal of difficulty getting together enough postage to mail the brief and appendix copies to your office. So I delivered the package containing the two copies each of the inf and appendix to his office after it opened, as I related to you in our telephone conversation. I do not know the name of his receptionest; I can find out next week if it is important. His office is closed today, being the weekend. Thank you for your help and consideration in this matter. Very truly yours, David K. Salishing David L. Salisbury encl:

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID L. SALISBURY)	
Plaintiff-Appellant)	CIVIL APPEAL
18)	DOCKET NO. 75-7324
The COUTHERN NEW ENGLAND TELEPHONE)	
COMPANY, INC., and WILLIAM J. O'KEEFE)	
Defendants-Appellees)	

SUPPLEMENTAL CERTIFICATION OF SERVICE

This is to certify that on November 4, 1975, I personally handed two copies each of my brief and ppendices in the above entitled appeal, to the clerk-receptionest in the offices of Griffin & Brayton, Esqs, 49 Leavenworth Street, Waterbury, Connecticut, and requested that she give them to Attorney Peter J. Tyrrell, counsel for the defendants in the above entitled appeal.

Respectfully submitted,

DAVID L. SALISBURY P.O. Box 1771
Waterbury

Waterbury, Connecticut 06720

FILED Arm 21 1 08 PH '75

U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT EN HAVEN, CONN.

DISTRICT OF CONNECTICUT

:

DAVID L. SALISBURY

CIVIL NO. 15770

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY and WILLIAM J. O'KEEFE

> RULING ON DEFENDANTS' MOTION TO RECONSIDER MOTION TO DISMISS

The plaintiff, appearing pro se, commenced this civil rights action under 42 U.S.C. \$\$ 1983, 1985, 1986, and 1988 claiming that the defendant public utility company, with one of its attorneys, discontinued his telephone service without notice or just cause in violation of his right to procedural due process.

Defendants moved to dismiss claiming that such termination did not constitute state action. This motion to dismiss was denied on November 8, 1973, on the ground that "[t]here has been sufficient showing that the defendant utility company acted under color of state law in terminating plaintiff's telephone service without notice or just cause." Salisbury v. Southern New England Telephone Co., 365 F. Supp. 1023, 1025 (D. Conn. 1973). On February 10, 1975, defendants were given leave to submit a motion requesting this Court to reconsider prior ruling in light of the principles enunciated by the United States Supreme Court in Jackson v. Metropolitan Edison Co., _______, 43 U.S.L.W. \$110

(December 23, 1974). The Court having reconsidered its prior ruling on the basis of the papers submitted and the Supreme Court's opinion in <u>Jackson</u>, the defendants' motion to dismiss is now granted for reasons set forth below.

Prior to the Supreme Court decision in <u>Jackson</u>, there was a divergence of opinion regarding the state action question in cases involving the discontinuance of utility service. See cases cited in <u>Salisbury</u>, supra at 1024. In light of this disparity among the Circuits, and in view of the emphasis on close examination of the facts in state action cases, <u>Moose Lodge No. 107 v. Irvis</u>, 407 U.S. 163, 172 (1972); <u>Burton v. Wilmington Parking Authority</u>, 365 U.S. 715, 722 (1961); <u>Palmer v. Columbia Gas of Ohio, Inc.</u>, 479 F. 2d 153, 162 (6 Cir. 1973), this Court found that the "comprehensively regulated and controlled" defendant public utility operated under color of state law in terminating plaintiff's tolephone service. 365 F.Supp. at 1025.

In <u>Jackson</u>, however, the Supreme Court held that the termination of electrical service by a privately owned and operated, but heavily regulated, utility did not constitute

Although the defendants have never addressed plaintiff's claims under 42 U.S.C. §§ 1985, 1986, and 1988, the Court has considered the sufficiency of these claims sua sponte. The complaint does not state a cause of action under 42 U.S.C. §§ 1985 and 1986 because it fails to allege intentional or purposeful discrimination designed to favor one individual or class over another, as required by 42 U.S.C. § 1985(3). Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); Denman v. Leedy, 479 F.2d 1097 (6 Cir. 1973). 42 U.S.C. § 1988 creates no independent cause of action. Moor v. Alameda County, 411 U.S. 693 (1973).

state action. Neither regulation, nor the fact that such regulation was "detailed and extensive," converted action of a utility company into that of the State. 43 U.S.L.W. at 4111-12; see Moose Lodge No. 107 v. Irvis, supra at 176-77; Public Utilities Commission v. Pollak, 343 U.S. 451, 462 (1952); Holodnak v. Avco Corp., F.2d (2 Cir. 1975), Slip Op. at 1837. It therefore affirmed the dismissal of plaintiff's \$ 1983 action.

Plaintiff, in the case at bar, attempts to distinguish Jackson on four grounds. It is first argued that by performing an essential public service, the utility company is performing a traditional state function. See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946) (company town); Evans v. Newton, 382 U.S. 296 (1966) (municipal park). While Jackson acknowledged the viability of the traditional state function doctrine, 43 U.S.L.W. at 4112, the Court concluded that the utility did not operate within the domain "traditionally the exclusive prerogative of the State" because the Pennsylvania statute imposed no obligation upon the State to furnish electrical services. The Court declined to expand the traditional state function doctrine to a "broad principle that all businesses 'affected with the public interest' are state actors in all actions." Id. Plaintiff at bar concedes that no obligation attaches to the State of Connecticut to furnish utility service; therefore state action may not be

Additionally, plaintiff suggests in his brief that defendants monopoly status under the suspices of the Connecticut Public Utility Commission justifies a finding of state action. However, a monopoly status has been consistently held to be not determinative of the question. See Jackson, supra; Moose Lodge No. 107, supra; Pollak, supra at 462.

premised on this ground. Plaintiff next claims that affirmative approval by the Public Utilities Commission provides the sufficient mexus between the utility company's termination and the State. Affirmative approval of termination procedures subsequent to hearings may bear on the state action issue. Public Utilities Commission v. Pollak, supra. Yet Jackson is clearly dispositive of this issue. Referring to approval of termination procedures, Justice Rehnquist stated: Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action." 43 U.S.L.W. 4114. As in Jackson, supra at 4113, plaintiff's utility service was terminated under tariffs filed by the defendant, rather than under regulations prescribed by the Connecticut Public Utilities Commission. Further, there has been no evidence presented that termination procedures have been the subject of Commission scrutiny. To the contrary, they are part of tariffs acquiesced in by the Commission since the tariffs became effective in 1934. "[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." Powe v. Miles, 407 F.2d 73, 61 (2 Cir. 1968).

The plaintiff's third contention is that the State somehow has encouraged the defendant utility company to deny plaintiff due process of law. See Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Reitman v. Mulkey, 387 U.S. 369 (1967). Adickes and Reitman dealt with state encouragement of the particular constitutionally violative acts there in question. There is no evidence before this Court that the Connecticut Public Utilities Commission has played such a role in the plaintiff's alleged deprivations. Quite to the contrary, plaintiff's only contention is that the utility company-utility commission relationship represents encouragement per se. In view of Jackson, this contention must fail.

Finally, the plaintiff suggests that Conn. Gen. Stat § 16-49, providing a scheme by which public utility companies furnish 56% of the Public Utilities Commission's expenses, creates a symbiotic relationship between the privately owned public utilities and the Commission. This argument appeals to the authority of Burton v. Wilmington Parking Authority, supra, where state action was found in the discrimination practices by a private restauranteur who leased his premises from a municipal parking authority and operated his restaurant within the confines of a public parking structure. There, physical proximity and a \$28,790 annual rent were found sufficient to support the conclusion that "[t]he State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity . . . " Id. at 725.

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Nonetheless, Pennsylvania has a statute similar to Conn. Gen. Stat. \$ 16-49 providing for the assessment of regulatory expenses upon public utilities. Penn. Stat. 66 § 1461. Without specially alluding to this financial interdependence, the Supreme Court in Jackson found the symbiotic relationship present in Burton absent between the Metropolitan Edison Company and the Pennsylvania Public Utilities Commission. The same result is dictated in the case at bar. Justice Rehnquist's conclusion in Jackson is appropriate to the case presently before this Court: All the [plaintiff's] arguments taken together show no more than that [defendant] was a heavily regulated private utility, enjoying at least a partial monopoly in the providing of . . . service within its territory, and that it elected to terminate service to [plaintiff] in a manner which the . . . Commission found permissible under state law. Under our decision this is not sufficient to connect the State . . . with [defendant's] action so as to make the latter's conduct attributed to the State 43 U.S.L.W. at 4114. Accordingly, applying the guidelines set forth in Jackson, defendant utility company's termination of plaintiff's telephone service does not constitute state action. The defendants' motion to dismiss is granted; the case is hereby dismissed. Dated at New Haven, Connecticut, this 18th day of April, 1975. Robert C. Zampano United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

APR 25 9 09 AH '75

U. S. DISTRICT COURT NEW HAVEN, COMN.

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CIVIL NO. 15,770

JUDGMENT

This cause having first come on for consideration on defendants' motion to dismiss, said motion having been denied by the Court in its Ruling on Defendants' Motion to Dismiss the Complaint, entered November 8, 1973; thereafter, the defendants having filed another motion to dismiss and motion for summary judgment and the Court having denied same and all pending related motions filed by plaintiff and defendant, in its Ruling on Motion for Summary Judgment, entered February 10, 1975, but allowing defendants 20 days from the date of said Ruling to file a motion requesting this Court to reconsider its November 8, 1973 ruling on their motion to dismiss, and said Motion to Reconsider Defendants' Motion to Dismiss having been filed and considered by the Court, and the Court having rendered its Ruling on Defendants' Motion to Reconsider Motion to Dismiss, under date of April 21, 1975, granting same,

It is ORDERED and ADJUDGED that plaintiff recover nothing and that this action be and is hereby dismissed, with costs to the defendants.

Dated at New Haven, Connecticut, this 25th day of April, 1975.

Sylvester A. Markowski

Clerk, United States District Court

Deputy In Charge

FILED HAY 21 10 53 AH '75 U. S. DISTRICT COURT NEW HAVEN, CONN.

IN THE UNITED STATES DISTRICT COURT FOR THE JUDICIAL DISTRICT OF CONNECTICUT

DAVID L. SALISBURY)	
1	Plaintiff)	
vs)	CIVIL DIVISION
The SOUTHERN NEW E	NGLAND)	FILE NUMBER15,770
TELEPHONE COMPANY,	INC.,)	
and WILLIAM J. O'K	EEFE,)	NOTICE OF APPEAL
ET ALS	Defendants	}	May 14, 1975

Notice is hereby given that DAVID L. SALISBURY, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 25th day of April, 1975.

The Plaintiff

David L. Salisbury P.O. Box 1771

Waterbury, Connecticut 06720

CERTIFICATE OF SERVICE

On this 21⁵⁷ day of May, 1975, a true and correct copy of the foregoing was served upon the Defendants- Appellees by mailing same to their counsel of record.

SALISBURY VS S.N.E.T.CO., CIVIL NO. 75-7324 APPALLENT'S BRIEF

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